

MONTESQUIEU's

SPIRIT

OF

L A W S.

IN TWO VOLUMES.



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1506

THE

SPIRIT

OF

L A W S.

Translated from the FRENCH of

M. DE SECONDAT,

BARON DE MONTESQUIEU.

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THE

SPIRIT

OF

L A W S.

BOOK XX.

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Of laws in relation to commerce, confidered in its nature and diffinctions.

CHAP. I.

Of commerce.

HE following subjects deserve to be treated in a more extensive manner: but the nature of this work will not allow it. Fain would I glide down a gentle river; but I am carried away by a torent.

Commerce is a cure for the most destructive prejudices; for it is almost a general rule, that whereever we find agreeable manners, there commerce flourishes; and that wherever there is commerce, there we meet with agreeable manners.

Let us not be aftonished, then, if our manners are now less favage than formerly. Commerce has Vol. II.

every-where diffused a knowledge of the manners of all nations; these are compared one with another, and from this comparison arise the greatest

advantages.

Commerical laws, it may be faid, improve manners, for the fame reason as they destroy them. They corrupt the purest manners *; this was the subject of Plato's complaints: and we every day see that they polish and refine the most barbarous.

CHAP. II.

Of the spirit of commerce.

PEace is the natural effect of trade. Two nations who traffic with each other become reciprocally dependent; for if one has an interest in buying, the other has an interest in selling; and thus their union is founded on their mutual necessities.

But if the spirit of commerce unites nations, it does not in the same manner unite individuals. We see, that in + countries where the people move only by the spirit of commerce, they make a traffic of all the humane, all the moral virtues: the most trisling things, those which humanity would demand, are there done, or there given, only for money.

The spirit of trade produces in the mind of man a certain sense of exact justice, opposite on the one

+ Holland.

^{*} Cæsar said of the Gauls, that they were spoiled by the neighbourhood and the commerce of Marseilles; insomuch that they who sormerly always conquered the Germans, were now become inseriour to them. War of the Gauls, lib. 6.

hand to robbery, and on the other to those moral virtues which forbid our always adhering rigidly to our own private interest, and suffer us to neglect it

for the advantage of others.

The total privation of trade, on the contrary, produces robbery, which Aristotle ranks in the number of means of acquiring: yet it is not at all inconsistent with certain moral virtues. Hospitality, for instance, is most rare in trading countries, while it is found in the most admirable perfection

among nations of robbers.

It is a facrilege, fays Tacitus, for a German to shut his door against any man whomsover, whether known or unknown. He who has * behaved with hospitality to a stranger, goes to shew him another house where this hospitality is also practised; and he is there received with the same humanity. But when the Germans had founded kingdoms, hospitality was become burthensome. This appears by two laws of the † code of the Burgundians; one of which inflicted a penalty on every barbarian, who presumed to shew a stranger the house of a Roman; and the other decreed, that whoever received a stranger should be indemnified by the inhabitants, every one being obliged to pay his proper proportion.

CHAP. III.

Of the poverty of the people.

There are two forts of poor; those who are rendered such by the severity of the government; these are indeed incapable of performing almost

^{*} Et qui modo hospes suerat, monstrator hospitii. De morib. Germ. Vid. Cæsar, de bello Gal. lib. 6. † Tit. 38.

any great action, because their indigence is a part of their slavery. Others are poor, only because they either despise, or know not the conveniencies of life; and these are capable of accomplishing great things, because their poverty constitutes a part of their liberty.

CHAP. IV.

Of commerce in different governments.

That has fome relation to forms of government. In a monarchy it is founded on luxury; and the fingle view with which it is carried on, is to procure every thing that can contribute to the pride, the pleasure, and the capricious whimsies of the nation. In republics, it is commonly founded on occonomy. Their merchants having an eye to all the nations of the earth, bring from one what is wanted by another. It is thus that the republics of Tyre, Carthage, Athens, Marseilles, Florence, Venice, and Holland, engaged in commerce.

This kind of traffic has a natural relation to a republican government; to monarchies it is only occasional. For as it is founded on the practice of gaining little, and even less than other nations, and of making up for this by gaining incessantly; it can hardly be carried on by a people swallowed up in luxury, who spend much, and see nothing but objects of grandeur.

Cicero was of this opinion, when he so justly said *, " that he did not like that the same people "should be at once both the lords and factors of the universe." For this would indeed be to sup-

^{*} Nolo eundem populum imperatorem & portitorem effe terrarum.

pose, that every individual in the state, and the whole state collectively, had their heads constantly filled with grand views, and at the same time with small ones; which is a contradiction.

Not but that the most noble enterprises are completed also in those states which subsist by economical commerce: they have even an intrepidity, not to be found in monarchies. And the reason

is this.

One branch of commerce leads to another, the small to the moderate, the moderate to the great; thus he who has had so much desire of gaining a little, raises himself to a situation in which he is not less desirous of gaining a great deal.

Besides, the grand enterprises of merchants are always necessarily connected with the affairs of the public. But in monarchies, these public affairs give as much distrust to the merchants, as in free states they appear to give safety. Great enterprises therefore in commerce are not for monarchical,

but for republican governments.

In short, an opinion of greater certainty, as to the possession of property in these states, makes them undertake every thing. They slatter themselves with the hopes of receiving great advantages from the smiles of fortune, and therefore boldly expose what they have already acquired, in order to acquire more; risking nothing but as the means of obtaining.

A GENERAL RULE. A nation in flavery labours more to preferve than to acquire; a free na-

tion, more to acquire than to preferve.

CHAP. V.

Of nations that have entered into an economical commerce.

Marseilles, a necessary retreat in the midst of a tempestuous sea; Marseilles, a harbour which all the winds, the shelves of the sea, the disposition of the coasts, point out for a landing-place, became frequented by mariners; while the sterility * of the adjacent country determined the citizens to an economical commerce. It was necessary that they should be laborious, to supply what nature had refused; that they should be just, in order to live among barbarous nations, from whom they were to derive their prosperity; that they should be moderate, that they might always enjoy the sweets of a tranquil government; in fine, that they should be frugal in their manners, that they might perpetually enjoy a trade, the more certain, as it was less advantageous.

We every where fee violence and oppression give birth to a commerce founded on occonomy, while men are constrained to take refuge in marshes, in isles, in the shallows of the sea, and even on rocks themselves. Thus it was, that Tyre, Venice, and the cities of Holland, were founded. Fugitives found there a place of safety. It was necessary that they should subsist; they drew therefore their subsistence from the whole u-

niverse.

^{*} Justin, 1. 43. c. 3.

CHAP. VI.

The Spirit of England, with respect to commerce.

THE tariff, or customs of England, are very unfettled, with respect to other nations; they are changed, in some measure, with every parliament, either by taking off particular duties, or by imposing new ones. They endeavour by this means still to preserve their independence. Supremely jealous with respect to trade, they bind themselves but little by treaties, and depend only on their own laws.

Other nations have made the interests of commerce yield to those of politics; the English, on the contrary, have always made their political inte-

rests give way to those of commerce.

They know better than any other people upon earth, how to value at the same time these three great advantages, religion, commerce, and liberty.

CHAP. VII.

In what manner the oeconomical commerce has been fometimes restrained.

IN feveral kingdoms laws have been made, extremely proper to humble the states that have entered into the economical commerce. They have forbid their importing any merchandizes, except the product of their respective countries; and have permitted them to traffic only in vessels built in the kingdom to which they brought their commodities.

It is necessary that the kingdom which imposes these laws should itself be able easily to engage in commerce; commerce; otherwise it will, at least, be an equal sufferer. It is much more advantageous to trade with a commercial nation, whose profits are moderate, and who are rendered in some sort dependent by the affairs of commerce; with a nation, whose larger views, and whose extended trade enables them to dispose of their superstuous merchandises; with a wealthy nation, who can take off many of their commodities, and make them a quicker return in specie; with a nation under a kind of necessity to be faithful, pacific from principle, and that seeks to gain, and not to conquer; it is much better, I say, to trade with such a nation, than with others, their constant rivals, who will never grant such great advantages.

CHAP. VIII.

Of the prohibition of commerce.

IT is a true maxim, That one nation should never exclude another from trading with it, except for very great reasons. The Japanese trade only with two nations, the Chinese and the Dutch. The * Chinese gain a thousand per cent. upon sugars, and sometimes as much by the goods they take in exchange. The Dutch make nearly the same profits. Every nation that acts upon Japanese principles must necessarily be deceived; for it is competition which sets a just value on merchandises, and establishes the relation between them.

Much less ought a state to lay itself under an obligation of selling its manufactures only to a single nation, under a pretence of their taking all at a certain price. The Poles, in this manner, dispose of their corn to the city of Dantzic; and several Indian princes have made a like contract for their

^{*} Du Halde, vol. 2. p. 70.

spices with the Dutch *. These agreements are proper only for a poor nation, whose inhabitants are satisfied to forego the hopes of enriching themselves provided they can be secure of a certain substitute; or for nations, whose slavery consists either in renouncing the use of those things which nature has given them, or in being obliged to submit to a disadvantageous commerce.

CHAP. IX.

An institution adapted to economical commerce.

In states that carry on an economical commerce, they have luckily established banks, which by their credit have formed a new species of wealth; but it would be quite wrong to introduce them into governments whose commerce is founded only in luxury. The erecting of banks in countries governed by an absolute monarch, supposes money on the one side, and on the other power; that is, on the one hand, the means of procuring every thing without any power, and on the other the power, without any means of procuring at all. In a government of this kind, none but the prince ever had, or can have a treasure; and wherever there is one, it no sooner becomes great, than it becomes the treasure of the prince.

For the same reason, all affociations of merchants, in order to carry on a particular commerce, are improper in absolute governments. The design of these companies is to give to the wealth of private persons the weight of public riches. But, in those governments, this weight can be found only in the prince. Nay, they are not even always proper in states engaged in economical commerce;

^{*} This was first established by the Portuguese. Fr. Pirard's voyages, chap. 15. part 2.

Vol. II. B for.

for, if the trade be not so great as to surpass the management of particular persons, it is much better to leave it open, than by exclusive privileges, to restrain the liberty of commerce.

CHAP. X.

The same subject continued.

A Free port may be established in the dominions of states whose commerce is economical. That economy in the government, which always attends the frugality of individuals, is, if I may so express myself, the soul of its economical commerce. The loss it sustains with respect to customs, it can repair by drawing from the wealth and industry of the republic. But in a monarchy, an establishment of this kind must be opposite to reason; for it could have no other effect, than to ease luxury of the weight of taxes. This would be depriving itself of the only advantage that luxury can procure, and of the only curb which, in a constitution like this, it is capable of receiving.

CHAP. XI.

Of the freedom of commerce.

THE freedom of commerce is not a power granted to the merchants to do what they please: This would be more properly its flavery. The conftraint of the merchant is not the constraint of commerce. It is in the freest countries that the merchant finds innumerable obstacles; and he is never less crossed by laws, than in a country of slaves.

England prohibits the exportation of her wool; coals must be brought by sea to the capital; no horses, except geldings, are allowed to be export-

ed; and the veffels * of her colonies, trading to Europe, must take in water in England. The English constrain the merchant, but it is in favour of commerce.

CHAP. XII.

What it is that destroys this freedom.

WHEREVER commerce subsists, customs are established. Commerce is the exportation and importation of merchandises, with a view to the advantage of the state: Customs are a certain right over this same exportation and importation, founded also on the advantage of the state. From hence it becomes necessary, that the state should be neuter between its customs and its commerce, that neither of these two interfere with each other; and then the inhabitants enjoy a free commerce.

The farming of the customs destroys commerce by its injustice, and vexations, as well as by the excess of the imposts: but, independent of this, it destroys it even more by the difficulties that arise from it, and by the formalities it exacts. In England, where the customs are managed by the king's officers, business is negotiated with a singular facility; one word of writing accomplishes the greatest affairs. The merchant needs not lose an infinite deal of time; he has no occasion for a particular commissioner, either to obviate all the difficulties of the farmers, or to submit to them.

^{*} Act of navigation, 1660. It is only in time of war, that the merchants of Boston and Philadelphia fend their vessels directly to the Mediterranean.

CHAP. XIII.

The laws of commerce concerning the confiscation of merchandises.

THE Magna Charta of England forbids the feizing and confiscating, in case of war, the effects of foreign merchants, except by way of reprifals. It is very remarkable, that the English have

made this one of the articles of their liberty.

In the late war between Spain and England, the former made a * law which punished with death those who brought English merchandises into the dominions of Spain; and the same penalty on those who carried Spanish merchandises into England. An ordinance like this cannot, I believe, find a precedent in any laws but those of Japan. It equally shocks humanity, the spirit of commerce, and the harmony which ought to subsist in the proportion of penalties; it confounds all our ideas, making that a crime against the state which is only a violation of civil polity.

CHAP. XIV.

Of seizing the persons of merchants.

SOLON + made a law, that the Athenians should no longer seize the body for civil debts. This law he ‡ received from Egypt. It had been made by Boccoris, and renewed by Sesostris.

This law is extremely good, with respect to the

* Published at Cadiz, in March 1740.

+ Plutarch, in his treatife against lending upon usury.

† Diodorus, book i. part 2. chap. 3.

generality

generality of civil * affairs; but there is sufficient reason for its not being observed in those of commerce. For, as merchants are obliged to intrust large sums, frequently for a very short time, and to pay money as well as to receive it, there is a necessity, that the debtor should constantly sulfil his engagements at the time prefixed; and from hence it becomes necessary to lay a constraint on his perfon.

In affairs relating to common civil contracts, the law ought not to permit the seizure of the person; because the liberty of one citizen is of greater importance to the public, than the ease or prosperity of another. But in conventions derived from commerce, the law ought to consider the public prosperity, as of greater importance than the liberty of a citizen; which, however, does not hinder the restrictions and limitations that humanity and good policy demand.

CHAP. XV.

An excellent law.

A DMIRABLE is that law of Geneva which excludes from the magistracy, and even from the admittance into the great council, the children of those who have lived or died insolvent, except they have discharged their father's debts. It has this effect; it gives a considence in the merchants, in the magistrates, and in the city itself. There the credit of the individual has also all the weight of public credit.

^{*} The Greek legislators were to blame, in preventing the arms and plough of any man from being taken in pledge, and yet permitting the taking of the man himself. Diodorus, book i. part 2. chap. 3.

CHAP. XVI.

Of the judges of commerce.

XENOPHON, in his book of revenues, would have rewards given to those overseers of commerce, who dispatched the causes brought before them with the greatest expedition. He was sensible of the need of our modern jurisdiction of a conful. The Romans, in the lower empire *, had this kind of tribunal for their marriners.

The affairs of commerce are but little susceptible of formalities. These are the actions of a day, and are every day followed by others of the same nature. Hence it becomes necessary, that every day they should be decided. It is otherwise with those actions of life which have a principal influence on futurity, but rarely happen. We seldom marry more than once: Deeds and wills are not the work of every day: We are but once of age.

Plato † fays, that in a city where there is no maritime commerce, there ought not to be above half the number of civil laws: This is very true. Commerce brings into the fame country different kinds of people; it introduces also a great number of contracts, and of species of wealth, with various

ways of acquiring it.

Thus in a trading city, there are fewer judges,

On laws, book 8.

^{*} Leg. 7. cod. Theod. de navicul.

CHAP. XVII.

That a prince ought not to engage himself in com-

THEOPHILUS * feeing a veffel laden with merchandifes for his wife Theodora, ordered it to be burnt. "I am Emperor, faid he, and you make "me the master of a galley: By what means shall these poor men gain a livelihood, if we take their trade out of their hands?" He might have added, who shall set bounds to us, if we monopolize all to ourselves? Who shall oblige us to suffil all our engagements? Our courtiers will follow our example; they will be more greedy, and more unjust than we: The people have some considence in our justice, they will have none in our opulence: All these numerous duties, which are the cause of their wants, are certain proofs of ours.

CHAP. XVIII.

The same subject continued.

WHEN the Portuguese and Castilians bore sway in the East-Indies, commerce had such opulent branches, that their princes did not fail to seize them. This ruined their settlements in those parts of the world.

The viceroy of Goa granted exclusive privileges to particular persons. The people had no considence in these men, and the commerce declined by the perpetual change of those to whom it was intrusted; nobody took care to improve it, or to leave it entire to his successour. In short, the prosit centered in a few hands, and was not sufficiently extended.

^{*} Zonaras.

CHAP. XIX.

Of commerce in a monarchy.

IT is contrary to the spirit of commerce, that any of the nobility should be merchants in a monarchical government. This, said the emperors * Honorious and Theodosius, would be pernicious to cities; and would remove the facility of buying and selling between the merchants and the plebeians.

It is contrary to the spirit of monarchy, to admit the nobility into commerce. The custom of suffering the nobility of England to trade, is one of those things which has there greatly contributed to weaken the monarchical government.

CHAP. XX.

A fingular reflection.

PERSONS struck with the practice of some states, imagine that in France they ought to make laws to engage the nobility to enter into commerce. But these laws would be the means of destroying the nobility, without being of any advantage to trade. The practice of this country is extremely wise; merchants are not nobles, though they may become so: They have the hopes of obtaining a degree of nobility, unattended with its actual inconveniencies. There is no surer way of being advanced above their profession, than to manage it well, or with success; which is generally the consequence of superiour ability.

Laws which oblige every one to continue in his profession, and to devolve it to his children, neither are, nor can be of use in any but † despotic

* Leg. nobiliores cod. de comm. et leg. ult. de refcind. vendit.

† This is actually very often the case in such governments.

kingdoms;

kingdoms; where no body either can or ought to have emulation.

Let none fay, that every one will succeed better in his profession, when he cannot change it for another. I say, a person will succeed best when those who have excelled, hope to arise to another.

The possibility of purchasing honour with gold, encourages many merchants to put themselves in circumstances by which they may attain it. I do not take upon me to examine the justice of thus bartering for money, the reward of virtue. There are governments, where this may be very useful.

In France, the dignity of the long robe, which places those who wear it between the great nobility and the people, and without having fuch shining honours as the former, has all their privileges; a dignity, which, while this body, the depositary of the laws, is encircled with glory, leaves the private members in a mediocrity of fortune; a dignity in which there is no other means of distinction, but by a fuperiour capacity and virtue, but which still leaves in view one much more illustrious: The warlike nobility likewife, who conceive that whatever degree of wealth they are possessed of, they may still increase their fortunes, but who are ashamed of augmenting, if they begin not with diffipating their estates; who always serve their prince with their whole capital stock, and when that is funk, make room for others who follow their example; who go to war, that they may never be reproached with not having been there; who, when they can no longer hope for riches, live in expectation of honours, and when they have not obtained the latter, enjoythe confolation of having acquired glory: All these things together have necessarily contributed to augment the grandeur of this kingdom; and Vol. II.

if for two or three centuries it has been inceffantly increasing in power, this must be attributed not to fortune, who was never famed for constancy, but to the goodness of its laws.

CHAP. XXI.

To what nations commerce is prejudicial.

R Iches confift either in lands, or in moveable effects. The lands of every country are commonly poffessed by the natives. The laws of most ftates render foreigners unwilling to purchase their lands; and nothing but the presence of the owner improves them: this kind of riches therefore belongs to every flate in particular. But moveable effects, as money, notes, bills of exchange, stocks in companies, veffels, and in fine, all merchandifes, belong to the whole world in general; which in this respect is composed of but one fingle state, of which all the focieties upon earth are members. The people who possess more of these moveable effects than any other in the universe, are the most rich. Some states have an immense quantity, acquired by their commodities, by the labour of their mechanics, by their industry, by their discoveries, and even by chance. The avarice of nations makes them quarrel for the moveables of the whole uni-If we could find a ftate fo unhappy, as to be deprived of the effects of other countries, and at the fame time of almost all its own, the proprietors of the lands would be only planters to foreign-This state, wanting all, could acquire nothing; wherefore it would be much better for the inhabitants not to have the leaft commerce with any nation upon earth; for commerce, in these circumstances, must necessarily lead them to poverty.

A country that constantly exports fewer manufactures,

factures, or commodities, than it receives, will foon find the balance finking; it will receive less and less, till, falling into extreme poverty, it will re-

ceive nothing at all.

In trading countries, the specie which suddenly vanishes, quickly returns; because those nations that have received it, are its debtors; but it never returns into those states of which we have just been speaking, because those who have received it, owe

them nothing.

Poland will ferve us for an example. It has fcarcely any of those things which we call the moveable effects of the universe, except corn, the produce of its lands. Some of the lords possess entire provinces; they oppress the husbandmen, in order to have greater quantities of corn, which they fend to strangers, to procure the superfluous demands of luxury. If Poland had no foreign trade, its inhabitants would be more happy. grandees, who would have only their corn, would give it to their peafants for sublistence; as their too extensive estates would become burthensome, they would therefore divide them amongst their peasants; every one would find skins or wool in their herds or flocks, fo that they would no longer be at an immense expence in providing cloaths; the great, who are always fond of luxury, not being able to find it but in their own country, would encourage the labour of the poor. This nation, I affirm, would then become more flourishing, at least if it did not become barbarous; and this the laws might eafily prevent.

Let us next consider Japan. The vast quantity of what they can receive, is the cause of the vast quantity of Merchandises they are capable of sending abroad. Things are thus in as nice an equilibrium, as if the importation and exportation were but small. Besides, this kind of exuberance in the state is productive of a thousand advantages: there

is a greater confumption, a greater quantity of those things on which the arts are exercised; more men employed, and more numerous means of acquiring power; exigencies may also happen, that may require a speedy affistance, which so opulent a state can better afford than any other. It is difficult for a country to avoid having superfluities. But it is the nature of commerce to render the superfluous useful, and the useful necessary. The state will be therefore able to afford necessaries to a much greater number of subjects.

Let us fay then, that it is not those nations who have need of nothing, that must lose by trade; it is those who have need of every thing. It is not such people as have a sufficiency within themselves, but those who are most in want, that will find an advantage in putting a stop to all commer-

cial intercourfe.

BOOK XXI.

Of Laws relative to Commerce, confidered in the revolutions it has met with in the world.

CHAP. I.

Some general considerations.

Though commerce be subject to great revolutions, yet it is possible that certain physical causes, as the qualities of the soil, or the climate, may fix its nature for ever.

We at present carry on the trade of the Indies merely by means of the filver which we send thither. ther. The * Romans carried annually thither about fifty millions of festerces; and this silver, as ours is at present, was exchanged for merchandises which were brought to the west. Every nation that ever traded to the Indies, has constantly carried bul-

lion, and brought merchandises in return.

It is nature herself that produces this effect. The Indians have their arts adapted to their manner of living. Our luxury cannot be theirs; nor their Their climate neither demands nor wants ours. permits hardly any thing which comes from us. They go in a great measure naked; such cloaths as they have, the country itself furnishes; and their religion, which is deeply rooted, gives them an aversion for those things that serve for our nourish-They want therefore nothing but our bullion, to ferve as the medium of value, and for this they give us merchandifes in return, with which the frugality of the people, and the nature of the country, furnishes them in great abundance. Those ancient † authors who have mentioned the Indies, describe them just as we now find them, as to their policy, customs, and manners. The Indies have ever been, they will ever be, the fame Indies they are at prefent; and in every period of time those who trade to that country, must carry specie this ther, and bring none in return.

CHAP. II.

Of the people of Africa.

THE greatest part of the people on the coast of Africa are savages and barbarians. The prin-

* Pliny, lib. 6. chap. 23.

[†] See Pliny, book vi. chap. 19. and Strabo, book

cipal reason, I believe, of this is, because the small countries capable of being inhabited, are separated from each other by large and almost uninhabitable tracts of land. They are without industry or arts. They have gold in abundance, which they receive immediately from the hand of nature. Every civilized state is therefore in a condition to traffic with them to advantage, by raising their esteem for things of no value, and receiving a very high price in return.

CHAP. III.

That the wants of the people in the fouth are different from those of the north.

TN Europe there is a kind of balance between the fouthern and northern nations. The first have every convenience of life, and few of its wants: the last have many wants and few conveniencies. To one, nature has given much, and demands but little; to the other, she has given but little, The equilibrium and demands a great deal. is maintained by the laziness of the southern nations, and by the industry and activity which she has given to those in the north. The latter are obliged to undergo exceffive labour, without which they would want every thing, and degenerate into bar-This has naturalized flavery to the people of the fouth: as they can eafily dispense with riches, they can more eafily dispense with liberty. But the people of the north have need of liberty, for this can best procure them the means of fatisfying all those wants which they have received from na-The people of the north, then, are in a forced state, if they are not either free or barbarians. Almost all the people of the fouth are in fome measure in a state of violence, if they are not flaves.

CHAP.

CHAP. IV.

The principal difference between the commerce of the ancients and the moderns.

THE world has found itself, from time to time, in different situations; by which the sace of commerce has been altered. The trade of Europe is at present carried on principally from the north to the south; and the difference of climates is the cause that the several nations have great occasion for the merchandises of each other. For example, the liquors of the south, which are carried to the north, form a commerce little known to the ancients. Thus the burden of vessels, which was formerly computed by measures of corn, is at present determined by tons of liquor.

The ancient commerce, as far as it is known to us, was carried on from one port in the Mediterranean to another; and was almost wholly confined to the fouth. Now the people of the same climate, having nearly the same things of their own, have not the same need of trading amongst themselves as with those of a different climate. The commerce of Europe was therefore formerly less

extended than at prefent.

This does not at all contradict what I have faid of our commerce to the Indies: for here the prodigious difference of climate destroys all relation between their wants and ours.

CHAP. V.

Other differences.

COmmerce is fometimes destroyed by conquerors, fometimes cramped by monarchs; it traverses the

the earth, flies from the place where it is oppressed, and stays where it has liberty to breathe: It reigns at present where nothing was formerly to be seen but deserts, seas, and rocks; and where it once

reigned, now there are only deferts.

To fee Colchis in its present situation, which is no more than a vast forest, where the people are every day decreasing, and only defend their liberty to sell themselves by piecemeal to the Turks and Persians; one could never imagine, that this country had ever, in the time of the Romans, been full of cities, where commerce convened all the nations of the world. We find no monument of these sacts in the country itself; there are no traces of them, except in * Pliny and † Strabo.

The history of commerce is that of the communication of people. Their numerous defeats, and the flux and reflux of populations and devastations,

here form the most extraordinary events.

CHAP. VI.

Of the commerce of the ancients.

THE immense treasures of Semiramis, which could not be acquired in a day, give us reason to believe, that the Assyrians themselves had pillaged other rich nations, as other nations afterwards pillaged them.

The effect of commerce is riches; the consequence of riches, luxury; and that of luxury, the perfec-

tion of arts.

We find that the arts were carried to great perfection in the time of Semiramis ‡; which is a sufficient indication, that a considerable commerce was then established.

^{*} Lib. vi. † Lib. 2. | Diodorus, lib. 2. † Ibid.

In the empires of Asia there was a great commerce of luxury. The history of luxury would make a fine part of that of commerce. The luxury of the Persians was that of the Medes, as the luxury of the Medes was that of the Assyrians.

Great revolutions have happened in Asia. The north-east parts of Persia, viz. Hyrcania, Margiana, Bactria, &c. were formerly full of flourishing cities * which are now no more; and the north of this † empire, that is, the isthmus which separates the Caspian and the Euxine seas, was covered with cities and nations, which are now de-

stroyed.

Eratosthenes ‡ and Aristobulus learn from Patroclus, that the merchandises of India passed by the Oxus into the sea of Pontus. Marcus Varro tells us, that, the time when Pompey commanded against Mithridates, they were informed, that people went in feven days from India to the country of the Bactrians, and to the river Icarus, which falls into the Oxus; that by this means they were able to bring the merchandifes of India across the Caspian fea, and to enter the mouth of the Cyrus; from whence it was only five days journey to the Phasis, a river that discharges itself into the Eux-There is no doubt but it was by the nations inhabiting these several countries, that the great empires of the Affyrians, Medes, and Perfians, had a communication with the most distant parts of the east and west.

An entire stop is now put to this communication.

^{*} Pliny, lib. 6. chap. 16. and Strabo, lib. 11.

[†] Strabo, lib. 11. ‡ Strabo, ibid.

^{*} See Pliny, lib. 6. chap. 17. See also Strabo, lib. 11 upon the passage by which the merchandises were conveyed from the Phasis to the Cyrus.

All these countries have been laid waste by the † Tartars, and are still insested by this destructive nation. The Oxus no longer runs into the Caspian sea; the Tartars, for some private ‡ reasons, have changed its course, and it now loses itself in the barren sands.

The Jaxartes, which was formerly a barrier between the polite and the barbarous nations, has had its course turned in the same manner by the Tartars, and it no longer empties itself into

the fea.

Seleucus Nicator formed * the project of joining the Euxine to the Caspian sea. This project, which would have greatly facilitated the commerce of those days, vanished at his || death. We are not certain it could have been executed in the isthmus which separates the two seas. This country is at present very little known; it is depopulated, and sull of forests; indeed water is not wanting, for an infinite number of rivers roll into it from mount Caucasus: but as this mountain forms the north of the isthmus, and extends like two arms § towards the south, it would have been a grand obstacle to such an enterprise, especially in those

‡ See Jenkinson's account of this, in the collection

of voyages to the North, vol. 4.

§ See Strabo, lib. 11.

[†] This is the reason why those who have described this country, since it has been in the possession of the Tartars, have entirely disfigured it. The chart made of the Caspian sea, by order of the late Czar Peter I. has discovered the egregious errours of our modern ones; and by this it appears, that this sea is conformable to the representations of the ancients. See Pliny, lib. 6. cap. 12.

^{*} Claudius Cæfar, in Pliny, lib. 6. cap. 11.

He was flain by Ptolemy Ceraunus.

times when they had not the art of making fluices.

It may be imagined, that Seleucus would have joined the two feas in the very place where Peter I. has fince joined them; that is, in that neck of land where the Tanais approaches the Volga: but the north of the Caspian sea was not then discovered.

While the empires of Asia enjoyed the commerce of luxury, the Tyrians had the commerce of œconomy, which they extended through the world. Bochard has employed the first book of his Canaan, in enumerating the colonies which they sent into all the countries bordering upon the sea: they passed the Pillars of Hercules, and made establishments to on the coast of the ocean.

In those times their pilots were obliged to follow the coasts, which were, if I may so express myself, their compass. Voyages were long, and painful. The laborious voyage of Ulysses has been the fruitful subject of the finest poem in the world, next to that which alone has the preference.

The little knowledge which the greatest part of the world had of those who were far distant from them, favoured the nations engaged in the economical commerce. They managed trade with as much obscurity as they pleased: they had all the advantages which the most intelligent nations could take over the most ignorant.

The Egyptians, a people who by their religion and their manners were averse to all communication with strangers, had scarcely at that time any foreign trade. They enjoyed a fruitful soil, and great plenty. Their country was the Japan of those times; it possessed every thing within itself.

[†] They founded Tartessus, and made a settlement at Cadiz.

So little jealous were those people of commerce, that they left that of the Red sea to all the petty nations that had any harbours in it. Here they suffered the Idumæans, the Syrians, and the Jews to have fleets. Solomon † employed in this navi-

gation the Tyrians, who knew these seas.

Josephus | fays, that his nation being entirely employed in agriculture, knew little of navigation: the Jews therefore traded only occasionally in the Red Sea. They took from the Idumeans Eloth and Eziongeber, from whom they received this commerce; they lost these two cities, and with them lost this commerce.

It was not so with the Phænicians; theirs was not a commerce of luxury; nor was their trade owing to conquest: their frugality, their abilities, their industry, their perils, and the hardships they suffered, rendered them necessary to all the nations of the world.

Before Alexander, the people bordering on the Red Sea traded only in this sea, and in that of Africa. The astonishment which filled the universe at the discovery of the Indian sea, under that conqueror, is of this a sufficient proof. I have observed *, that bullion was always carried to the Indies, and never any brought from thence; now the Jewish sleets, which brought gold and silver by the way of the Red Sea, returned from Africa, and not from the Indies.

Besides, this navigation was made on the eastern coast of Africa; for the state of navigation at that time is a convincing proof, that they did not fail to a very distant shore. I am not ignorant, that the steets of Solomon and Jehosaphat returned only every three years; but I do not see that the time ta-

⁺ Kings lib. 1. cap. 9. Chron. lib. 2. chap. 8.

Against Apion. * Chap. 1. of this book.

ken up in the voyage is any proof of the greatness of the distance.

Pliny and Strabo informs us, that the junks of India and the Red Sea were twenty days in performing a voyage, which a Greek or Roman veffel would accomplifh || in feven. In this proportion, a voyage of one year made by the fleets of Greece or Rome, would take very near three, when per-

formed by those of Solomon.

Two ships of unequal swiftness do not perform their voyage in a time proportionate to their swiftness. Slowness is frequently the cause of much greater slowness. When it becomes necessary to follow the coasts, and to be incessantly in a different position, when they must wait for a fair wind to get out of a gulf, and for another to proceed; a good sailor takes the advantage of every favourable moment, while the other still continues in a difficult situation, and waits many days for another change.

This flowness of the Indian vessels, which in an equal time could make but the third of the way of those of the Greeks and Romans, may be explained by what we every day see in our modern navigation. The Indian vessels, which were built with a kind of sea-rushes, drew less water than those of Greece and Rome, which were of wood, and join-

ed with iron.

We may compare these Indian vessels to those at present made use of in ports of little depth of water. Such are those of Venice, and even of all * Italy in general, of the Baltic, and of the province of † Holland. Their ships, which ought to be able

† I fay the province of Holland; for the ports of

Zealand are deep enough.

See Pliny, lib. 6. chap. 22. and Strabo, lib. 15.
They are mostly shallow; but Sicily has excellent ports.

to go in and out of port, are built round and broad at the bottom; while those of other nations, who have good harbours, are formed to fink deep into the water. This mechanism renders these last mentioned veffels able to fail much nearer the wind: while the first can hardly fail, except the wind be nearly in the poop. A ship that finks deep into the water fails towards the same fide with almost every wind; this proceeds from the refistance which the veffel, whilst driven by the wind, meets with from the water, from which it receives a strong support; and from the length of the veffel, which presents its side to the wind, while from the form of the helm the prow is turned to the point proposed; so that the can fail very near to the wind, or, in other words, very near to the point from whence the wind blows. But when the hull is round and broad at the bottom, and confequently draws little water, it no longer finds this fleady fupport; the wind drives the veffel, which is incapable of refistance, and can run then but with a fmall variation from the point opposite to the wind. From whence it follows, that broad-bottomed veffels are longer in performing voyages.

1. They lose much time in waiting for the wind, especially if they are obliged frequently to change their course. 2. They sail much slower, because, not having a proper support from a depth of water, they cannot carry so much sail. If this be the case at a time when the arts are every where known, at a time when art corrects the desects of nature, and even of art itself; if at this time, I say, we find this difference, how great must that have been in

the navigation of the ancients?

I cannot yet leave this subject. The Indian vessels were small, and those of the Greeks and Romans, if we except their machines built for oftentation, much less than ours. Now, the smaller the vessel, the greater danger it encounters from

fou!

foul weather. A tempest that would swallow up a fmall veffel, would only make a large one roll. The more one body is surpassed by another in bigness, the more its surface is relatively small. From whence it follows, that in a small ship there is a less proportion, that is, a greater difference as to the furface of the veffel, and the weight or lading the can carry, than in a large one. We know that it is a pretty general practice, to make the weight of the lading equal to that of half the water the vessel is able to contain. Suppose a vessel will contain eight hundred tons, her lading then must be four hundred; and that of a veffel which would hold but four hundred tons of water, would be two hundred tons. Thus the largeness of the first ship will be to the weight she carries as 8 to 4; and that of the fecond as 4 to 2. Let us suppose then, that the furface of the greater is to the furface of the smaller as 8 to 6; the surface of this will be to her weight as 6 to 2, while the furface of the former will be to her weight only as 8 to 4. Therefore, as the winds and waves act only upon the furface, the large veffel will by her weight refift their impetuofity much more than the small. We find from history, that before the discovery of the mariners compass, four attempts were made to fail round the coast of Africa. The Phænicians sent by * Necho, and Eudoxus + flying from the wrath of Ptolemy Lathyrus, fet out from the Red Sea, and fucceeded. Sataspes ‡ sent by Xerxes, and Hanno by the Carthaginians, fet out from the Pillars of Hercules, and failed in the attempt.

The capital point in furrounding Africa was, to

^{*} He was desirous of conquering it, Herodotus, lib. 4.

[†] Pliny, lib. ii. cap. 67. Pomponius Mela, lib. iii. cap. 9.

[‡] Herodotus in Melpomene.

discover and double the cape of Good Hope. Those who set out from the Red Sea found this cape nearer by half, than it would have been in setting out from the Mediterranean. The shore from the Red Sea is not so shallow, as that from the Cape * to Hercules's Pillars. The discovery of the Cape by Hercules's pillars was owing to the invention of the compass, which permitted them to leave the coast of Africa, and to lanch out † into the vast ocean, in order to sail towards the island of St. Helena, or towards the coast of Brasil. It was therefore very possible for them to sail from the Red Sea into the Mediterranean, but not to set out from the Mediterranean to return by the Red Sea.

Thus, without making this grand circuit, after which they could hardly ever hope to return, it was most natural to trade to the east of Africa by the Red Sea, and to the western coasts by Hercules's

Pillars.

CHAP. VII.

Of the commerce of the Greeks, and that of Egypt, after the conquest of Alexander.

THE first Greeks were all pirates. Minos, who enjoyed the empire of the sea, was only more successful, perhaps, than others in piracy; for his maritime dominion extended no farther than round

* Add to this what I shall fay in chap. 8. of this

book, on the navigation of Hanno.

† In the months of October, November, December, and January, the wind in the Atlantic ocean is found to blow north-east; our ships therefore either cross the line, and, to avoid the wind which is there generally at east, they direct their course to the south; or else they enter into the Torrid Zone, in those places where the wind is at west.

his own isle. But when the Greeks became a great people, the Athenians obtained the real dominion of the fea; because this trading and victorious nation gave laws to the most potent monarch * of that time; and humbled the maritime powers of Syria,

of the ifle of Cyprus, and Phænicia.

But this Athenian lordship of the sea deserves to be more particularly mentioned. "Athens, fays " Xenothon +, rules the fea; but as the country " of Attica is joined to the continent, it is ravaged " by enemics, while the Athenians are engaged in " distant expeditions. Their leaders fuffer their " lands to be destroyed, and secure their wealth " by fending it to fome island. The populace, " who are not possessed of lands, have no uneasi-" nefs. But if the Athenians inhabited an island, " and, besides this, enjoyed the empire of the sea, " they would, as long as they were poffeffed of " these advantages, be able to annoy others, and " at the same time be out of all danger of being " annoyed." One would imagine that Xenophon

was speaking of England.

The Athenians, a people whose heads were filled with ambitious projects; the Athenians, who augmented their jealoufy, instead of encreasing their influence; who were more attentive to extend their maritime power than enjoy it; whose political government was fuch that the common people diffributed the public revenues amongst themselves while the rich were in a state of oppression; the Athenians, I fay, did not carry on fo extensive a commerce as might be expected from the produce of their mines, from the multitude of their flaves, from the number of their feamen, from their influence over the cities of Greece, and above all, from the excellent institutions of Solon.

^{*} The king of Persia. + On the Athenian republic. VOL. II. trade E

trade was almost wholly confined to Greece, and to the Euxine sea; from whence they drew their subfistence.

Corinth separated two seas, and opened and shut the Peloponnesus: It was the key of Greece, and a city, in fine, of the greatest importance, at a time when the people of Greece were a world, and the cities of Greece nations. Its trade was very extensive, having a port to receive the merchandises of Asia; and another those of Italy: For the great difficulties which attended the doubling cape Malea, where the * meeting of opposite winds causes fhipwrecks, induced every one to go to Corinth, and they could even convey their veffels over land from one sea to the other. Never was there a city, in which the works of art were carried to fo high a degree of perfection. But here religion finished the corruption, which their opulence began. They erected a temple to Venus, in which more than a thousand courtesans were consecrated to that deity; from this feminary came the greatest part of those celebrated beauties, whose history Athenæus has prefumed to commit to writing.

Four great events happened in the reign of A-lexander, which entirely changed the face of commerce; the taking of Tyre, the conquest of Egypt, that likewise of the Indies, and the discovery of the sea which lies south of that country. The Greeks of Egypt found themselves in an excellent situation for carrying on a prodigious commerce; they were masters of the ports of the Red Sea; Tyre, the rival of all the trading nations, was no more; they were not constrained by the ancient † superstitions of the country; and Egypt was become the centre

of the universe.

^{*} See Strabo, lib. 8.

⁺ Which inspired an aversion for strangers.

The empire of Persia extended to the Indus *. Darius, long before Alexander, had sent † some vessels which sailed down this river, and passed even into the Red Sea. How then were the Greeks the first who traded to the Indies by the south? Had not the Persians done this before? Did they make no advantage of seas which were so near them; of the very seas that washed their coasts? Alexander, it is true, conquered the Indies; but was it necessary for him to conquer a country, in order to trade with it? This is what I shall now examine.

Ariana t, which extended from the Persian guif as far as the Indus, and from the South fea to the mountains of Paropamifus, depended indeed in fome measure on the empire of Persia: But in the fouthern part it was barren, fcorched, rude, and uncultivated. Tradition | relates, that the armies of Semiramis and Cyrus perished in these deserts: and Alexander, who caused his fleet to follow him. could not avoid lofing in this place a great part of his army. The Persians left the whole coast to the Icthyophagi &, the Oritæ, and other barbarous nations. Besides, the Persians were no + great failors, and their very religion debarred them from entertaining any fuch notion as that of a maritime commerce. The voyage undertaken by Darius's direction upon the Indus, and the Indian fea, proceeded rather from the capriciousness of a prince

^{*} Strabo, lib. 15.

[†] Herodotus in Melpomene.

† Strabo lib. 15.

Strabo, lib. 15. § Pliny, lib. vi. cap. 23. Strabo, lib. 16.

⁴ They failed not upon the river, lest they should defile the elements. Hyde's religion of the Persians. Even to this day they have no maritime commerce. Those who take to the sea, are treated by them as atheists.

vainly ambitious of shewing his power, than from any settled regular project. It was attended with no consequence, either to the advantage of commerce, or of navigation. They emerged from their ignorance, only to plunge into it again.

Besides, it was a received opinion * before the expedition of Alexander, that the southern parts of India were uninhabitable †. This proceeded from a tradition that ‡ Semiramis had brought back from thence only twenty men, and Cyrus but

feven.

Alexander entered by the north. His defign was to march towards the east: But having found a part of the fouth full of great nations, cities, and rivers, he attempted to conquer it, and succeeded.

He then formed the defign of uniting the Indies to the western nations by a maritime commerce, as he had already united them by the colonies he

had established by land.

He ordered a fleet to be built on the Hydaspes, and then fell down that river, entered the Indus, and failed even to its mouth. The fleet followed the coast from the Indus along the banks of the country of the Oritæ, of the Icthyophagi, of Carmania and Persia. He built cities, and would not suffer the Icthyophagi to || live on fish, being defirous of having the borders of the sea inhabited by civilized nations. One sicritus and Nearchus wrote § a journal of this voyage, which was performed in ten months. They arrived at Susa, where

* Strabo, lib. 15.

[†] Herodotus (in Melpomene) fays, that Darius conquered the Indies; this must be understood only to mean Ariana; and even this was only an ideal conquest.

[‡] Strabo, lib. 15.

Pliny, book vi. chap. 23. § Ibid.

they found Alexander, who gave an entertainment to his whole army. He had left the fleet at Pata-

la *, to go thither by land.

This prince had founded Alexandria, with a view of fecuring his conquest of Egypt; this was a key to open it in the very place where the kings his † predecessours had a key to shut it; and he had not the least thought of a commerce, of which the discovery of the Indian sea could alone give him the idea.

The kings of Syria left the commerce of the fouth to those of Egypt, and attached themselves only to the northern trade, which was carried on by means of the Oxus and the Caspian sea. They then imagined that this fea was part of the ± nor-Seleucus and Antiochus applied thern ocean. themselves to make discoveries in it, with a particular attention; and with this view they fcoured it with their fleets |. That part which Seleucus furveyed, was called the Seleucidian fea; that which Antiochus discovered, received the name of the fea of Antiochus. Attentive to the projects they might have formed of attacking Europe from hence on the back of Gaul and Germany, they neglected the feas on the fouth; whether it was that the Ptolemies, by means of their fleets on the Red Sea, were already become the masters of it; or that they had discovered an invincible aversion in the Persians against engaging in maritime affairs; or,

* A city in the island of Patalena, at the mouth of the Indus.

‡ Pliny, lib. ii. cap. 67. | Pliny, lib. vi. cap.

12. and Strabo, lib. ii pag. 507.

[†] Alexandria was founded on a flat shore, called Rhacotis, where, in ancient times, the kings had kept a garrison, to prevent all strangers, and more particularly the Greeks, from entering the country. Pliny, lib. v. cap. 10 Strabo, lib. 17.

in fine, that the general submission of all the people in the south, left no room for them to slatter themselves with the hopes of further conquests.

I am furprised, I confess, at the obstinacy with which the ancients believed that the Caspian sea was a part of the ocean. The expeditions of Alexander, of the kings of Syria, of the Parthians, and the Romans, could not make them change their fentiments; notwithstanding these nations described the Caspian sea with a wonderful exactness: But men are generally fo tenacious of their errours. that they acquiesce to truth as late as possible. When only the fouth of this fea was known, it was at first taken for the ocean; in proportion as they advanced along the banks of the northern coast, instead of imagining it a great lake, they still believed it to be the ocean, that here made a fort of a bay; when they had almost finished its circuit, and had quite furveyed the northern coaft, though their eyes were then opened, yet they shut them once more; and took the mouth of the Volga for a strait, or a prolongation of the ocean.

The land-army of Alexander had been on the east only as far as the Hyphasis, which is the last of those rivers that fall into the Indus: Thus the first trade which the Greeks carried on to the Indies was confined to a very small part of the country. Seleucus Nicator penetrated as far as the Ganges *, and by that means discovered the sea into which this river falls, that is to say, the bay of Bengal. The moderns discover countries by voyages at sea; the ancients discovered seas by con-

quests at land.

Strabo +, notwithstanding the testimony of A-pollodorus, seems to doubt whether the Grecian ‡

* Pliny, lib. vi. cap. 17. + Lib. 15.

[†] The Macedonians of Bactria, India, and Ariana having separated themselves from Syria, formed a great state. kings

kings of Bactria proceeded farther than Seleucus and Alexander. I am apt to think they went no further to the east, and that they did not pass the Ganges: but they went farther towards the south: They discovered * Siger, and the ports in the Guzarat and Malabar, which gave rise to the naviga-

tion I am going to mention.

Pliny + informs us, that the navigation of the Indies was fuccessively carried on by three different ways. At first they sailed, from the cape of Siagre, to the island of Patalena, which is at the mouth of the Indus. This we find was the course that Alexander's fleet fleered to the Indies. They took afterwards ‡ a shorter and more certain course, by failing from the same cape or promontory to Siger: This can be no other but the kingdom of Siger, mentioned by Strabo |, and discovered by the Grecian kings of Bactria. Pliny, by faying that this way was shorter than the other, can mean only that the voyage was made in lefs time; For as Siger was discovered by the kings of Bactria, it must have been farther than the Indus: By this passage they must therefore have avoided the winding of certain coasts, and taken advantage of particular winds. The merchants at last took a third way; they failed to Canes, or Ocelis, ports fituated at the entrance of the Red Sea; from whence, by a west wind, they arrived at Muziris, the first ftaple town of the Indies, and from thence to the other ports.

Here we see, that instead of failing to the mouth of the Red Sea as far as Siagre by coasting Arabia Felix to the north-east, they steared directly from west to east, from one side to the other, by means of the trade-winds, whose regular course they dis-

^{*} Apollonius Adrumatinus in Strabo, lib. ii.

[†] Lib. vi. cap. 23. ‡ Pliny, lib. vi. cap. 23. Lib. 11. Sigertidis regnum.

covered by failing in these latitudes. The ancients never lost fight of the coasts, but when they took advantage of these winds, which were to them a

kind of compass,

Pliny * fays, that they set sail for the Indies in the middle of summer, and returned towards the end of December, or in the beginning of January. This is entirely conformable to our naval journals. In that part of the Indian sea which is between the peninsula of Africa, and that on this side the Ganges, there are two monsoons; the first, during which the winds blow from west to east, begins in the month of August or September; and the second, during which the wind is in the east, begins in January. Thus we set sail from Africa for Malabar, at the season of the year that Ptolemy's sleet used to set out from thence; and we return too at the same time as they.

Alexander's fleet was feven months in failing from Patala to Sufa. It fet out in the month of July, that is, at a feason when no ship dares now put to sea to return from the Indies. Between these two monsoons there is an interval of time, during which the winds vary; when a north wind, meeting with the common winds, raises, especially near the coasts, the most terrible tempests. These continue during the months of June, July, and August. Alexander's fleet therefore setting fail from Patala in the month of July, must have been exposed to many storms, and the voyage must have been long, because they sailed against the trade-

wind.

Pliny fays that they fet out for the Indies at the end of summer; thus they spent the time proper for taking advantage of the trade-wind, in their passage from Alexandria to the Red Sea.

Observe here, I pray, how navigation has by lit-

^{*} Lib. vi. cap. 23.

tle and little arrived at perfection. Darius's fleet was two years and a half * in falling down the Indus, and going to the Red Sea. Afterwards the fleet of Alexander +, descending the Indus, arrived at Susa in ten months, having sailed three months on the Indus, and seven on the Indian sea: at last the passage from the coast of Malabar to the Red

Sea was made in forty days 1.

Strabo ||, who accounts for their ignorance of the countries between the Hypanis and the Ganges, fays, that there were very few of those who failed from Egypt to the Indies, that ever proceeded so far as the Ganges. Their sleets, in fact, never went thither: they failed with the western tradewinds from the mouth of the Red Sea to the coast of Malabar. They cast anchor in the ports along that coast, and never attempted to get round the peninsula on this side the Ganges by Cape Comorin and the coast of Coromandel. The plan of navigation laid down by the kings of Egypt and the Romans was, to set out and return the same year §.

Thus it is demonstrable, that the commerce of the Greeks and Romans to the Indies was much less extensive than ours. We know immense countries which to them were entirely unknown; we traffic with all the Indian nations; we even manage their trade, and in our bottoms carry on their

commerce.

But this commerce of the ancients was carried on with far greater facility than ours. And if the moderns were to trade only to the coast of Guzarat and Malabar, and, without seeking for the southern isles, were satisfied with what these islanders brought them, they would certainly prefer the way

^{*} Herodotus in Melpomene. † Pliny, lib. vi. cap. 23. † Ibid. | Lib. 15. § Pliny, lib. vi. cap. 23.

of Egypt to that of the Cape of Good Hope. * Strabo informs us, that they traded thus with

the people of Taprobane.

I shall finish this chapter with a reflection. Ptolemy the † geographer extends the eastern part of known Africa to Cape Prassum, and Arrian ‡ bounds it by Cape Raptum. Our best maps place Cape Prassum at Mossambique, in 14 degrees and a half south latitude, and Cape Raptum, at about ten degrees of the same latitude. But as the country extending from the kingdom of Aian (a kingdom that indeed produces no merchandise) becomes richer in proportion as it stretches towards the south, as far as the country of Sosala, where lies the source of riches; it appears at first view astonishing, that they should have thus retrogaded towards the North, instead of advancing to the South.

In proportion as their knowledge increased, navigation and trade deserted the coast of Africa for that of India. A rich and easy commerce made them neglect one less lucrative, and more full of difficulties. The eastern coast of Africa was less known than in the time of Solomon; and though Ptolemy speaks of Cape Prassum, it is rather as of a place that had been formerly known, than of one known at that time. Arrian || bounds the known country at Cape Raptum, because at that time they went no further. And though & Marcian of Heraclea extends it to Cape Prassum, his authority is of no weight: for he himself conses-

See the periple of the Ethrean sea.

Ptolemy and Arrian were nearly contemporaries.

^{*} Lib. 15. + Lib. iv. cap. 7. and Lib. viii.

⁶ His work is to be found in a collection of the small pieces of the Grecian geographers, printed at Oxford in 1698, vol. 1. p. 10.

fes *, that he copies from Artemidorus, and Artemidorus from Ptolemy.

CHAP. VIII.

Of Carthage and Marseilles.

CARTHAGE increased her power by her riches, and afterwards her riches by her power. Being mistress of the coasts of Africa, which are washed by the Mediterranean, she extended herself along the ocean. Hanno, by order of the senate of Carthage, distributed thirty thousand Carthaginians from Hercules's Pillars, as far as Cerne. This place, he says, is as far from Hercules's Pillars, as the latter from Carthage. This situation is extremely remarkable. It lets us see that Hanno limited his settlements to the 25th degree of north latitude, that is, to two or three degrees south of the Canaries.

Hanno being at Cerne, undertook another voyage, with a view of making further discoveries towards the fouth. He took but little notice of the continent. He followed the coast for twenty-six days, when he was obliged to return for want of provisions. The Carthaginians, it seems, made no use of this second enterprise. Scylax + says, that the sea is not ‡ navigable beyond Cerne, because it is shallow, full of mud and sea-weeds: And, in fact, there are many of these in those #

latitudes.

* Grec. Geog. pag. 1, 2.

+ See his periples, under the article of Carthage.

‡ See Herodotus in Melpomene on the obstacles

which Sataspes encountered.

|| See the charts and narrations in the first volume of voyages that contributed to the establishment of an East-India company, part I. pag. 201. This weed F 2

latitudes. The Carthaginian merchants mentioned by Scylax might find obstacles, which Hanno, who had fixty vessels of fifty oars each, had surmounted. Difficulties are at most but relative; besides, we ought not to confound an enterprise, in which bravery and resolution must be exerted, with things

that require no extraordinary conduct.

The relation of Hanno's voyage is a fine fragment of antiquity. It was written by the very man that performed it. His recital is not mingled with oftentation. Great commanders write their actions with fimplicity; because they receive more glory from facts than from words. The style is agreeable to the subject: he deals not in the marvellous. All he says of the climate, of the soil, the behaviour, the manners of the inhabitants, correspond with what is every day seen on this coast of Africa; one would imagine it the journal of a modern sailor.

He observed from his fleet, that in the day-time there was a prodigious silence on the continent, that in the night he heard the sound of various musical instruments, and that fires might then be every where seen, some larger than others. Our relations are conformable to this; it has been discovered, that in the day the savages retire into the forests to avoid the heat of the sun, that they light up great fires in the night to disperse the beasts of prey, and that they are passionately fond of music and dancing.

The same writer describes a volcano with all the phænomena of Vesuvius; and relates, that he took two hairy women, who chose to die rather than follow the Carthaginians, and whose skins he car-

covers the furface of the fea in fuch a manner, that it can fcarcely be perceived, and vessels can only pass through it with a stiff gale. ried to Carthage. This has been found not void of

probability.

This narration is so much the more valuable as it is a monument of Punic antiquity; and from hence alone it has been regarded as fabulous. For the Romans retained their hatred to the Carthaginians, even after they had destroyed them. But it was victory alone that decided whether we ought to say,

the Punic or the Roman faith.

Some moderns * have imbibed these prejudices. What is become, fay they, of the cities described by Hanno, of which even in Pliny's time there remained no vestiges? But it would have been a wonder indeed, if any fuch vestiges had remained. Was it a Corinth or Athens that Hanno built on these coasts? He left Carthaginian families in such places as were most commodious for trade, and fecured them as well as his hurry could permit against favages and wild beafts. The calamities of the Carthaginians put a period to the navigation of Africa; these families must necessarily then either perish or become favages. Besides, were the ruins of these cities even still in being, who is it that would venture into the woods and marihes to make the discovery? We find however, in Scylax and Polybius, that the Carthaginians had confiderable fettlements on these coasts. These are the vestiges of the cities of Hanno; there are no other, from the same reason that there are no other of Carthage itself.

The Carthaginians were in the high road to wealth; and had they gone so far as four degrees of north latitude, and sifteen of longitude, they would have discovered the gold coast. They would then have had a trade of much greater importance, than that which is carried on at present on that coast, at a time when America seems to

^{*} Mr. Dodwel. See his differtation on Hanno's Periplus.

have degraded the riches of all other countries. They would there have found treasures, of which they could never have been deprived by the Romans.

Very furprising things have been said of the riches of Spain. If we may believe aristotle *, the Phoenicians, who arrived at Tartessus, found so much silver there, that their ships could not hold it all; and they made of this metal their meanest utensils. The Carthaginians, according to Diodorus †, found so much gold and silver in the Pyrenæan mountains, that they adorned the anchors of their ships with it. But no foundation can be built on such popular reports. Let us therefore examine into the facts themselves.

We find in a fragment of Polybius cited by Strabo ‡, that the filver mines at the fource of the river Bætis, in which forty thousand men were employed, produced to the Romans twenty-five thousand drachmas a-day, that is, about five millions of livres a year, at fifty livres to the mark. The mountains that contained these mines were called the † filver mountains; which shows they were the Potosi of those times. At present the mines of Hanover do not employ a fourth part of the workmen, and yet they yield more. But as the Romans had not many copper-mines, and but sew of silver; and as the Greeks knew none but the Attic mines, which were of little value, they might well be astonished at their abundance.

In the war that broke out for the succession of Spain, a man called the Marquis of Rhodes, of whom it was said that he was ruined in golden mines, and enriched in hospitals §, proposed to the

+ Lib. 6.

^{*} Of wonderful things.

[‡] Lib. 3.

Mons argentarius.

He had some share in their management.

court of France to open the Pyrenæan mines. He alleged the example of the Tyrians, the Carthaginians, and the Romans. He was permitted to fearch, but fought in vain; he still alleged, and

found nothing.

The Carthaginians being masters of the gold and silver trade, were willing to be so of the lead and pewter. These metals were carried by land from the ports of Gaul upon the ocean, to those of the Mediterranean. The Carthaginians were desirous of receiving them at the first hand; they sent Himilco * to make a † settlement in the isles called Cassiterides, which are imagined to be those of

Scilly.

These voyages from Bætica into England have made some persons imagine that the Carthaginians knew the compass: but it is very certain, that they followed the coasts. There needs no other proof than Himilco's being sour months in sailing from the mouth of the Bætis to England: besides the famous piece of history of the Carthaginian || pilot, who, being sollowed by a Roman vessel, ran aground that he might not ‡ show her the way to England, plainly intimates that those vessels were very near the shore, when they sell in with each other.

The ancients might have performed voyages, that would make one imagine they had the compass, though they had not. If a pilot was far from land, and during his voyage had such serene weather,

^{*} It appears from Pliny, that this Himilco was fent at the same time with Hanno; as in the time of Agathocles, there were a Hanno and an Himilco, both chiefs of the Carthaginians. Mr. Dodwell conjectures, that these were the same; more especially, as the republic was then in its flourishing state. See his Dissertation on Hanno's Periplus.

[†] See Festus Avienus.

Strabo, lib. 3. towards the end.

t He was rewarded by the fenate of Carthage.

that in the night he could always see a polar star, and in the day the rising and setting of the sun, it is certain he might regulate his course as well as we do now by the compass: but this must be a fortuitous case, and not a regular method to na-

vigation.

We fee in the treaty which put an end to the first Punic war, that Carthage was principally attentive to preserve the empire of the sea, and Rome that of the land. Hanno *, in his negotiation with the Romans, declared that they should not be suffered even to wash their hands in the sea of Sicily; they were not permitted to sail beyond the promontorium pulchrum; they were forbid to trade in Sicily +, Sardinia, and Africa; except at Carthage: an exception that lets us see there was no design to savour them in their trade with that city.

In early times there had been very great wars between Carthage and Marfeilles ‡ on the fubject of After the peace they entered jointly into the economical commerce. Marfeilles at length grew jealous, especially as being equal to her rival in industry, she was become inferiour to her in This is the motive of her great fidelity to power. The war between the latter and the the Romans. Carthaginians in Spain, was a fource of riches to Marseilles, which was now become their magazine. The ruin of Carthage and Corinth still increased the glory of Marfeilles; and had it not been for the civil wars, in which this republic ought on no account to have engaged, she would have been happy

+ In the parts subject to the Carthaginians.

^{*} Frienshemius's supplement to Livy, decad. 2d. lib. 6.

[†] Carthaginiensium quoque exercitus, cum bellum captis piscatorum navibus ortum esset, sæpe suderunt pacemque victis dederunt. Justin, lib. 43. cap. 5. under

under the protection of the Romans, who had not the least jealoufy of her commerce.

CHAP. IX.

Of the genius of the Romans as to maritime affairs.

THE Romans laid no stress on any thing but their land-forces, who were disciplined to stand always firm, to fight on one spot, and there bravely to die. They could not like the practice of seamen, who sirst offer to sight, then sly, then return, constantly avoid danger, often make use of stratagems, and seldom of force. This was not suitable to the genius of the * Greeks, much less to that of the Romans.

They destined therefore to the sea only those citizens who were not † considerable enough to have a place in their legions. Their marines were com-

monly freed-men.

At this time, we have neither the same esteem for land-forces, nor the same contempt for those of the sea. In the first, ‡ art is decreased; in the second, it is augmented: now things are generally esteemed in proportion to the degree of ability requisite to discharge them.

† Polybius, lib. iv.

^{*} As Plato has observed, lib. iv. of laws.

[‡] See the confiderations on the causes of the rise and declension of the Roman grandeur. || Ibid.

CHAP. X.

Of the genius of the Romans with respect to com-

THE Romans were never distinguished by a jealousy for trade. They attacked Carthage as a rival, not as a trading nation. They favoured trading cities, though they were not subject to them. Thus they increased the power of Marseilles by the cession of a large territory. They were vastly asraid of barbarians; but had not the least apprehension from a trading people. Their genius, their glory, their military education, and the very form of their government, estranged them from commerce.

In the city they were employed only about war, elections, factions, and law-fuits; in the country, about agriculture; and, as for the provinces, a fevere and tyrannical government was incompatible

with commerce.

But their political constitution was not more opposite to trade, than their law of nations. "The people, fays * Pomponius the civilian, with whom we have neither friendship nor hospitality, nor alliance, are not our enemies; however, if any thing belonging to us falls into their hands, they are the proprietors of it; freemen become

" their flaves; and they are upon the same terms

" with respect to us."

Their civil law was not less oppressive. The law of Constantine, after having stigmatized as bastards the children of persons of a mean rank, who had been married to those of a superiour station, consounds women who keep a † shop for vending

* Leg. 5. ff. de captivis. + Quæ mercimoniis publice præfuit. Leg. 5. cod. de natural, liberis.

merchandifes

merchandises, with slaves, with women who keep taverns, with actresses, with the daughters of those who keep public stews, or who had been condemnsed to fight in the amphitheatre: this had its original in the ancient institutions of the Romans.

I am not ignorant that men prepossessed with these two ideas, that commerce is of the greatest service to a state, and that the Romans had the best regulated government in the world, have believed that they greatly honoured and encouraged commerce; but the truth is, they seldom troubled their heads about it.

CHAP. XI.

Of the commerce of the Romans with the barbarians.

THE Romans having erected Europe, Asia, and Africa into one vast empire; the weakness of the people and the tyranny of their laws united all the parts of this immense body. The Roman policy was then to avoid all communication with those nations whom they had not subdued: the sear of carrying to them the art of conquering, made them neglect the art of enriching themselves. They made laws to hinder all commerce with barbarians. "Let nobody," faid * Valens and Gratian, " fend " wine, oil, or other liquors to the barbarians, though it be only for them to tafte. Let no one " carry gold to them †", adds Gratian, Valentininian, and Theodosius; " rather, if they have any, " let our subjects deprive them of it by stratagem." The exportation 1 of iron was prohibited on pain of death.

^{*} Leg. ad barbaricum cod. quæ res exportari non debeant

⁺ Leg. 2. cod. de commerc. & mercator.

[†] Leg. 2. qua res exportari non debeant, and Procopius, War of the Persians, book, 1.

Domitian, a prince of great timidity, ordered the vines in Gaul to be pulled up; from a fear, no doubt, lest their wines should draw thither the barbarians. Probus and Julian, who had no such fears,

gave orders for their being planted again.

I am sensible, that, upon the declension of the Roman empire, the barbarians obliged the Romans to establish staple-towns +, and to trade with them. But even this is a proof that the minds the Romans were averse to commerce.

CHAP. XII.

Of the commerce of the Romans with Arabia and the Indies.

THE trade to Arabia Felix, and that to the Indies, were the two branches, and almost the only ones of their foreign commerce. The Arabs were formerly what they are at this day, equally addicted to trade and robbery. Their immense deferts on the one hand, and the riches which strangers went thither in search of, produced these two effects. These riches the Arabs found in their seas and forests; and as they sold much and purchased little, they drew to themselves the gold and silver of the Romans. The Europeans trade with them still in the same manner; the caravans of Aleppo, and the royal vessel of Suez, carry thither immense sums.

* See the Chronicles of Eusebius and Cedienus.

† Pliny, lib. 6. chap. 28.

Their

⁺ See the confiderations on the causes of the rise and declension of the Roman grandeur.

The caravans of Aleppo and Suez carry thither annually to the value of about two millions of livres, and as much more clandestinely; the royal vessel of Suez carries thither also two millions.

Their commerce to the Indies was very confiderable. Strabo * had been informed in Egypt, that they employed in this navigation one hundred and twenty vessels: this commerce was carried on entirely with bullion. They sent thither annually sifty millions of sesterces. Pliny + says, that the merchandises brought from thence were sold at Rome at cent. per cent. prosit. He speaks, I believe, too generally; if this trade had been so vastly prositable, every body would have been willing to engage in it, and then it would be at an end.

It will admit of a question, whether the trade to Arabia and the Indies was of any advantage to the Romans? They were obliged to export their bullion thither, though they had not, like us, the resource of America, which supplies what we send away. I am pursuaded that one of the reasons of their increasing the value of their specie by establishing base coin, was the scarcity of silver, owing to the continual exportation of it to the Indies: and though the commodities of this country were sold at Rome at the rate of cent. per cent. this prosit of the Romans, being obtained from the Romans themselves, could not enrich the empire.

It may be alleged, on the other hand, that this commerce increased the Roman navigation, and of course their power; that new merchandises augmented their inland trade, gave encouragement to the arts, and employment to the industrious; that the number of subjects multiplied in proportion to the new means of support; that this new commerce was productive of luxury, which I have proved to be as favourable to a monarchical government, as fatal to a commonwealth; that this establishment was of the same date as the fall of their republic;

† Lib. 6. cap. 23.

^{*} Lib. 2. pag. 81. of the edition printed 1587.

that the luxury of Rome was become necessary; and that it was extremely proper, that a city which had accumulated all the wealth of the universe should

refund it by its luxury.

We shall say but one word on their inland trade. Its principal branch was the corn brought to Rome for the subsistence of the people: but this was rather a political affair than a point of commerce. On this account the sailors were favoured with some privileges *, because the safety of the empire depended on their vigilance.

CHAP. XIII.

Of commerce after the destruction of the western empire.

Commerce was yet more undervalued after the invation of the Roman empire. The barbarous nations at first regarded it only as an opportunity for robbery; and when they had subdued the Romans, they honoured it no more than agriculture, and the other professions of a conquered people.

Soon was the commerce of Europe almost entirely lost. The nobility, who had every where the di-

rection of affairs, were in no pain about it.

The laws of the + Visigoths permitted private people to occupy half the beds of great rivers, provided the other half remained free for nets and boats. There must have been very little trade in countries conquered by these barbarians.

In those times were established the ridiculous rights of escheatage and shipwrecks. These men

^{*} Suet. in Claudio. leg. 7. cod. Theodof. de naviculariis.

⁺ Lib. 8. Tit. 4. § 9.

thought, that strangers not being united to them by any civil law, they owed them on the one hand no kind of justice, and on the other no sort of

pity.

In the narrow bounds which nature had originally prescribed to the people of the north, all were strangers to them; and in their poverty they regarded all only as contributing to their riches. Being established, before their conquests, on the coasts of a sea of very little breadth, and full of rocks, from these very rocks they drew their subssistence.

But the Romans, who made laws for all the universe, had established the most * humane ones with regard to shipwrecks. They suppressed the rapine of those who inhabited the coasts; and what was more still, the rapaciousness of their treasurers †.

CHAP. XIV.

A particular regulation.

THE law ‡ of the Visigoths made however one regulation in favour of commerce. It ordained that foreign merchants should be judged, in the differences that arose amongst themselves, by the laws and by judges of their own nation. This was founded on an established custom among all these mixed people, that every man should live under his own law: A custom of which I shall speak more at large in another place.

^{*} Toto titulo ff. de incend. ruin. & naufrag. & eod. naufragiis. & leg. 3. ff. ad leg. Cornel de fica-

[†] Leg. 1. cod. de naufragiis.

[‡] Lib. 2. sit. 3. § 2.

CHAP. XV.

Of commerce after the decay of the Roman power in the East.

THE Mahometans appeared, conquered, extended, and dispersed themselves. Egypt had particular sovereigns; these carried on the commerce of India, and being possessed of the merchandises of this country, drew to themselves the riches of all other nations. The Sultans of Egypt were the most powerful princes of those times. History informs us with what a constant and well-regulated force they stopped the ardour, the fire, and the impetuosity of the crusades.

CHAP. XVI.

How commerce broke through the barbarism of Europe.

A Ristotle's philosophy being carried to the west, pleased the subtile geniuses, who were the virtuosi of those times of ignorance. The schoolmen were infatuated with it, and derived from hence * their doctrine upon lending upon interest; this they confounded with usury, and condemned. Hence commerce, which was the profession only of mean persons, became that of knaves: for whenever a thing is forbidden, which nature permits or necessity requires, it is only making those who do it dishonest.

Commerce was transferred to a nation covered with infamy; and was foon ranked with the most shameful usury, with monopolies, with the levying

^{*} See Aristot, polit. lib. 1. cap. 9. and. 10.

of fubfidies, and with all the dishonest means of acquiring wealth.

The Jews +, enriched by their exactions, were pillaged by the tyranny of princes; which pleafed

indeed, but did not ease the people.

What passed in England may serve to give us an idea of what was done in other countries. King * John having imprisoned the Jews, in order to obtain their wealth; there were few who had not at least one of their eyes plucked out. Thus did that king influence his court of justice. A certain Iew who had a tooth pulled out every day for feven days fuccessively, gave ten thousand marks of filver for the eighth. Henry III. extorted from Aaron a Jew, at York, fourteen thousand marks of silver, and ten thousand for the queen. In those times they did by violence, what is now done in Poland with fome femblance of moderation. As princes could not dive into the purses of their subjects, because of their privileges, they put the Jews to the torture, who were not confidered as citi-

At last a custom was introduced of confiscating the effects of those Jews who embraced Christianity. This ridiculous custom is known only by the law, which suppressed it. The most vain and trisling reasons were given in justification of that proceeding: it was alleged, that it was proper to try them, in order to be certain that they had entirely shook off the slavery of the devil. But it is evident, that this confiscation was a species of the

[†] See in Marca Hispanica the constitutions of Arragon in the years 1228 and 1353; and in Brussel, the agreement in the year 1206, between the King, the Countess of Champagne, and Guy of Dampierre.

^{*} Stowe's furvey of London, book 3. pag. 54.

| The edict passed at Baville, April 4, 1392.

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right of ‡ amortifation, to recompense the prince, or the lords, for the taxes levied on the Jews, which ceased on their embracing Christianity. In those times, men, like lands, were regarded as property. I cannot help remarking by the way, how this nation has been sported with from one age to another: at one time, their effects were consistently, when they were willing to become Christians; and at another, if they refused to turn Christians, they were ordered to be burnt.

In the mean time, commerce was feen to arise from the bosom of Vexation and Despair. The Jews, proscribed by turns from every country, found out the way of saving their effects. By this means they rendered their retreats for ever fixed; for the princes might have been willing to ged rid of their persons, yet they did not chuse to get rid of their money.

The * Jews invented letters of exchange; commerce, by this means, became capable of eluding violence, and of maintaining every where its ground; the richest merchant having none but invisible effects, which he could convey imperceptibly, where-

ever he pleafed.

The theologians were obliged to limit their principles: and commerce, which they had before con-

† In France the Jews, were flaves in mortmain, and the Lords their fuccessours. Mr. Brussel mentions an agreement made in the year 1206, between the king and Thibaut count of Champagne, by which it was agreed, that the Jews of the one should not lend in the lands of the other.

* It is known, that under Philip Augustus, and Philip the Long, the Jews, who were chased from France, took refuge in Lombardy, and that there they gave to foreign merchants and travellers, secret letters, drawn upon those to whom they had intrusted their effects in France, which were accepted.

nected

nected by main force with knavery, re-entered, if I may so express myself, the bosom of Probity.

Thus we owe to the speculations of the schoolmen all the misfortunes which accompanied the destruction of commerce; and to the avarice of princes, the establishment of a practice which puts it in

some measure out of their power.

From this time, it became necessary, that princes should govern with more prudence, than they themselves could ever have imagined: For great exertions of authority were, in the event, found to be impolitic; and from experience it is manifest, that nothing but the goodness and lenity of a government can make it flourish.

We begin to be cured of Machiavelism, and recover from it every day. More moderation is become necessary in the councils of princes. What would formerly have been called a master-stroke in politics, would be now, independent of the horrour it might occasion, the greatest imprudence.

Happy is it for men that they are in a fituation, in which, though their passions prompt them to be wicked, it is however for their interest to be hu-

mane and virtuous.

C.H A P. XVII.

The discovery of two new worlds, and in what manner Europe is affected by it.

THE compass opened, if I may so express myself, the universe. Asia and Africa were found, of which only some borders were known; and Ame-

rica, of which we knew nothing.

The Portuguese, sailing on the Atlantic ocean, discovered the most southern point of Africa; they saw a vast sea, which carried them to the East-Indies. Their dangers upon this sea, the discovery of Mozambique, Melinda, and Calicut, have been

H 2

fung by Camoens, whose poems make us feel something of the charms of the Odyssey, and the magnificence of the Æneid.

The Venetians had hitherto carried on the trade of the Indies through the Turkish dominions, and pursued it in the midst of oppressions and discouragements. By the discovery of the Cape of Good Hope, and those which were made some time after, Italy was no longer the centre of the trading world; it was, if I may be permitted the expression, only a corner of the universe, and is so still. The commerce, even of the Levant depending now on that of the great trading nations to both the Indies, Italy can be no more than an accessory.

The Portuguese traded to the Indies in right of conquest. The * constraining laws, which the Dutch at present impose on the commerce of the little Indian princes, had been established before by

the Portuguese.

The fortune of the house of Austria was prodigious. Charles V. succeeded to the possession of Burgundy, Castille, and Arragon; he arrived asterwards at the Imperial dignity; and, to procure him a new kind of grandeur, the universe extended itself, and there was seen a new world paying him obeisance.

Christopher Columbus discovered America; and though Spain sent thither only a force so small that the least prince in Europe could have sent the same, yet it subdued two vast empires, and other great states.

While the Spaniards discovered and conquered the west, the Portuguese pushed their conquests and discoveries in the east. These two nations met each other; they had recourse to Pope Alexander VI. who made the celebrated line of partition, and adjudged the great process.

^{*} See the relation of Fr. Pirard, part ii. chap. 15.

But the other nations of Europe would not suffer them quietly to enjoy their shares. The Dutch chased the Portuguese from almost all their settlements in the East-Indies; and several other nations

planted colonies in America.

The Spaniards confidered these new-discovered countries, as the subject of conquest; while others, more refined in their views, found them to be the proper subjects of commerce, and upon this principle directed their proceedings. Hence several nations have conducted themselves with so much wisdom, that they have given a kind of sovereignty to companies of merchants, who governing these far distant countries only with a view to trade, have made a great accessary power, without embarrassing the principal state.

The colonies they have formed, are under a kind of dependence, of which there is scarcely an instance in all the colonies of the ancients; whether we consider them as holding of the state itself, or of some trading company established in the

state.

The defign of these colonies is, to trade on more advantageous conditions, than could otherwise be done with the neighbouring people, with whom all advantages are reciprocal. It has been established, that the * metropolis, or mother-country, alone shall trade in the colonies, and that from very good reason: Because the design of the settlement was the extension of commerce, not the foundation of a city, or of a new empire.

Thus it is still a fundamental law of Europe, that all commerce with a foreign colony shall be regarded as a mere monopoly, punishable by the laws of the country; and in this case we are not to be di-

^{*} This, in the language of the ancients, is the state which founded the colony.

rected by the laws and precedents of the * ancients,

which are not at all applicable.

It is likewise acknowledged, that a commerce established between the mother-countries does not include a permission to trade in the colonies; for these always continue in a state of prohibition.

The disadvantage of a colony that loses the liberty of commerce, is visibly compensated by the protection of the mother-country, who defends it

by her arms, or supports it by her laws.

From hence follows a third law of Europe, that when a foreign commerce with a colony is prohibited, it is not lawful to trade in those seas, except

in fuch cases as are excepted by treaty.

Nations who are with respect to the whole universe, what individuals are in a state, like these, are governed by the law of nature, and by particular laws of their own making. One nation may resign to another the sea, as well as the land. The Carthaginians forbade † the Romans to sail beyond certain limits, as the Greeks had obliged the king of Persia to keep as far distant from the sea-coast ‡ as a horse could gallop.

The great distance of our colonies is not an inconvenience that affects their safety; for if the mother-country, on whom they depend for their defence, is far distant, no less distant are those nations by whom they may be afraid of being con-

quered.

Besides, this distance is the cause that those who are established there, cannot conform to the man-

* Except the Carthaginians, as we see by the treaty which put an end to the first Punic war.

† Polybius, lib. 3.

† The king of Persia obliged himself by treaty, not to sail with any vessel of war beyond the Cyanean rocks, and the Chelidonian isles, Plutarch in the life of Cimon.

ner of living in a climate fo different from their own; they are obliged therefore to draw from the mother-country all the conveniencies of life. The *Carthaginians, to render the Sardinians and Corficans more dependent, forbad their planting, fowing, or doing any thing of the like kind under pain of death; fo that they supplied them with necessaries from Africa. The Europeans have compassed the same thing, without having recourse to such severe laws. Our colonies in the Caribbee islands are under an admirable regulation in this respect; the subject of their commerce is what we neither have, nor can produce; and they want what is the subject of ours.

A consequence of the discovery of America was the connecting Asia and Africa with Europe; it furnished materials for a trade with that vast part of Asia, known by the name of the East-Indies. Silver, that metal so useful as the medium of commerce, became now as a merchandise, the basis of the greatest commerce in the world. In fine, the navigation to Africa became necessary, in order to furnish us with men to labour in the mines, and to

cultivate the lands of America.

Europe is arrived to so high a degree of power, that nothing in history can be compared to it. Whether we consider the immensity of its expences, the grandeur of its engagements, the number of its troops, and the regular payment even of those that are least serviceable, and which are kept only for ostentation.

Father Du Halde fays +, that the interiour trade of China is much greater than that of all Europe. That might be, if our foreign trade did not augment our inland commerce. Europe carries on the trade and navigation of the other three parts of the

† Tome II. pag. 170.

^{*} Aristotle on wonderful things, lib. viii. dec. 2.

world; as France, England, and Holland, do nearly that of Europe.

CHAP. XVIII.

Of the riches which Spain drew from America.

IF Europe * has derived fo many advantages from the American trade, it feems natural to imagine, that Spain must have derived much greater. She drew from the newly discovered world so prodigious a quantity of gold and filver, that all we had

before could not be compared to it.

But (what one could never have expected) this great kingdom was every where baffled by its miffortunes. Philip II. who fucceeded Charles V. was obliged to make the celebrated bankruptcy known to all the world. There never was a prince who fuffered more from the murmurs, the infolence, and the revolt of troops conftantly ill paid.

From this time the monarchy of Spain has been incessantly declining. This has been owing to an interiour and physical defect in the nature of these riches, which renders them vain; a defect which

encreases every day.

Gold and filver are either a fictitious, or a representative wealth. The representative signs of wealth are extremely durable, and, in their own nature, but little subject to decay. But the more they are multiplied, the more they lose their value, because the fewer are the things which they represent.

The Spaniards, after the conquest of Mexico and Peru, abandoned their natural riches, in pur-

^{*} This has been already shewn in a small treatise, written by the author about twenty years ago; which has been almost entirely incorporated in the present work.

fuit of a reprefentative wealth which daily degraded itself. Gold and filver were extremely scarce in Europe; and Spain becoming all of a fudden mistress of a prodigious quantity of these metals, conceived hopes to which the never before aspired. The wealth fine found in the conquered countries, great as it was, did not however equal that of their mines. The Indians concealed part of them; and besides, these people who made no other use of gold and filver than to give magnificence to the temples of their gods, and to the palaces of their kings, fought not for it with an avarice like ours. In short, they had not the secret of drawing these metals from every mine; but only from those in which the feparation might be made with fire; they were strangers to the manner of making use of mercury, and perhaps to mercury itself.

However, it was not long before the specie of Europe was doubled; this appeared from the price of commodities, which every where was doubled.

The Spaniards raked into the mines, scooped out mountains, invented machines to draw out water, to break the ore and separate it; and, as they sported with the lives of the Indians, they forced them to labour without mercy. As the specie of Europe soon doubled, the profit of Spain diminished in the same proportion, and they had every year but the same quantity of a metal which was become by one half less precious.

In double the time the specie still doubled, and

the profit still diminished another half.

It diminished even more than half: Let us see in what manner.

To extract the gold from the mines, to give it the requisite preparations, and to import it into Europe, must be attended with some certain expence; I will suppose this to be as 1 to 64. When the specie was once doubled, and consequently became by one half less precious, the expence was as 2 Vol. II.

to 64. Thus the galleons which brought to Spain the same quantity of gold, brought a thing which really was of less value by one half, though the expences attending it had been one half higher.

If we proceed doubling and doubling, we shall find in this progression the cause of the impotency of the wealth of Spain. It is about two hundred years fince they have begun to work their Indian mines. I suppose the quantity of specie at present in the trading world is to that before the discovery of the Indies, as 32 is to 1; that is, it has been doubled five times: In two hundred years more the tame quantity will be to that before the discovery, as 64 is to one; that is, it will be doubled once more. Now, at present, fifty * quintals of ore yield four, five, and fix ounces of gold; and when it yields only two, the miner receives no more from it than his expences. In two hundred years, if it yields only four, this too will only defray his charges. There will then be but little profit to be drawn from the gold mines. The fame reasoning will hold good of filver, except that the working of the filver mines is a little more advantageous than those of gold.

But, if mines should be discovered so fruitful as to give a much greater profit, the more fruitful they will be, the sooner the profit will cease.

The Portuguese in Brasil have found mines of gold so rich, that they must necessarily very soon make a considerable diminution in the profits of

those of Spain, as well as in their own.

I have frequently heard people deplore the blindness of the court of France, who repulsed Christopher Columbus, when he made the proposal of discovering the Indies. Indeed they did, though perhaps without design, an act of the greatest wisdom. Spain has behaved like the foolish king, who desired that every thing he touched might be

^{*} See Frezier's voyages.

converted into gold, and who was obliged to beg of

the gods to put an end to his mifery.

The companies and banks established in many nations, have put a finishing stroke to the lowering of gold and silver, as a sign or representation of riches; for by new sections they have multiplied in such a manner the signs of wealth, that gold and silver having this office only in part, are become less precious.

This public credit ferves instead of mines, and diminishes the profit which the Spaniards draw

from theirs.

True it is, that the Dutch trade to the East-Indies has increased, in some measure, the value of the Spanish merchandise; for, as they carry bullion, and give it in exchange for the merchandises of the East, they ease the Spaniards of part of a commodity, which in Europe abounds too much.

And this trade, which may indirectly be regarded as that of Spain, is as advantageous to that nation, as to those who are directly employed in car-

rying it on.

From what has been faid, we may form a judgment of the last order of the council of Spain, which prohibits the making use of gold and tilver in gildings and other superfluities: A decree as ridiculous as it would be for the states of Holland to

prohibit the confumption of spices.

My reasoning does not hold good against all mines; those of Germany and Hungary, which produce little more than the expence of working them, are extremely useful. They are found in the principal state; they employ many thousand men, who there consume their superstuous commodities; and they are properly a manufacture of the country.

The mines of Germany and Hungary promote the culture of land; the working of those of Me-

xicojand Peru destroys it.

The Indies and Spain are two powers under the fame master; but the Indies are the principal, while Spain is only an accessory. It is in vain for politics to attempt to bring back the principal to the accessory; the Indies will always draw Spain to themselves.

Of the merchandises to the value of about fifty millions of livres annually sent to the Indies, Spain furnishes only two millions and a half: The Indies trade for fifty millions, the Spaniards for two

and a half.

That must be a bad kind of riches which depends on accident, and not on the industry of a nation, on the number of its inhabitants, and on the cultivation of its lands. The King of Spain, who receives great sums from his customhouse at Cadiz, is in this respect only a rich individual in a state extremely poor. Every thing passes between strangers and himself, while his subjects have scarcely any share in it: This commerce is independent both of the good and bad fortune of his kingdom.

Were some provinces of Castille able to give him a sum equal to that of the customhouse of Cadiz, his power would be much greater: His riches would be the effect of the wealth of the country: These provinces would animate all the others, and they would be altogether more capable of supporting their respective charges: Instead of a great

treasury, he would have a great people.

CHAP. XIX.

A problem.

IT is not for me to decide the question, whether if Spain be not herself able to carry on the trade of the Indies, it would not be better to leave it open to strangers? I will only say, that it is for her advantage to load this commerce with as few obstacles as politics will permit. When the merchandises

fes which feveral nations fend to the Indies are very dear, the inhabitants of that country give a great deal of their commodities, which are gold and filver, for very little of those of foreigners: The contrary of this happens when they are at a low price. It would perhaps be of use, that these nations should underfell each other, that by this means the merchandise carried to the Indies might be always cheap. These are principles which deserve to be examined, without separating them however from other considerations; the safety of the Indies, the advantages of one only customhouse, the danger of making great alterations, and the foreseen inconveniencies, which are often less dangerous than those which cannot be foreseen.

BOOK XXII.

Of Laws in relation to the Use of Money.

CHAP. I.

The reason of the use of money.

PEOPLE who have few merchandises, as savages, and among civilized nations, those who have only two or three species, trade by exchange. Thus the caravans of Moors who go to Tomboctou, in the heart of Africa, have no need of money, for they exchange their salt for gold. The Moor puts his salt in a heap, and the Negro his dust in another; if there is not gold enough, the Moor takes away some of his salt, or the Negro adds more gold, till both parties are agreed.

But when a nation traffics with a great variety of merchandises, money becomes necessary; because a metal, easily carried from place to place, saves the great expences which people would be obliged to

be at, if they always proceeded by exchange.

All nations having reciprocal wants, it frequently happens that one is defirous of a large quantity of the other's merchandifes, when the latter will have very little of theirs, though with respect to another nation the case is directly opposite. But when nations have money, and proceed by buying and felling, those who take most merchandises, pay the balance in specie. And there is this difference, that, in the case of buying, the trade carried on is in proportion to the wants of the nation that has the greatest demands; whilst in bartering, the trade is only according to the wants of the nation, whose demands are the sewest, without which this last would be under an impossibility of balancing its accounts.

CHAP. II.

Of the nature of money.

MONEY is a fign which represents the value of all merchandises. Metal is taken for this fign as being durable *, because it consumes but little by use; and because, without being destroyed, it is capable of many divisions. A precious metal has been chosen as a sign, as being most portable. A metal is most proper for a common measure, because it can be easily reduced to the same standard. Every state fixes upon it a particular impression, to the end, that the form may correspond with the standard and the weight, and that both may be known by inspection only.

The Athenians, not having the use of metals, made use of oxen †, and the Romans of sheep:

But

* The falt made use of for this purpose in Abyshinia has this defect, that it is continually wasting away.

† Herodotus in Clio, tells us, that the Lydians found out the art of coining money; the Greeks learn-

But one ox is not the fame as another ox, in the manner that one piece of metal may be the fame as another.

As specie is the sign of the value of merchandifes, paper is the sign of the value of specie; and when it is of the right fort, it represents this value in such a manner, that, as to the effects produced

by it, there is not the leaft difference.

In the fame manner, as money is the fign and reprefentative of a thing, every thing is a fign and reprefentative of money; and the state is in a profperous condition, when, on the one hand, money perfectly reprefents all things; and, on other, all things perfectly represent money, and are reciprocally the figns of each other; that is, they have fuch a relative value, that we may have the one as foon as we have the other. This never happens in any other than a moderate government, nor does it always happen there: For example, if the laws favour the dishonest debtor, his effects are no longer a representative or fign of money. With regard to a despotic government, it would be a prodigy, did things there represent their fign. Tyranny and distrust makes every one bury * his specie: Things are not there then the representative of money

Legislators have sometimes had the art, not only to make things, in their own nature, the representative of specie, but to convert them even into specie, like the current coin. Cæsar, when he was to a dictator, permitted debtors to give their lands in payment to their creditors, at the price they were

ed it from them; the Athenian coin had the impreftion of their ancient ox. I have feen one of the pieces in the Earl of Pembroke's cabinet.

† Cæsar on the civil war, book 3.

^{*} It is an ancient custom in Algiers, for the father of a family to have a treasure concealed in the earth. Hist. of the kingdom of Algiers, by Logie de Tassis.

worth before the civil war *. Tiberius ordered, that those who desired specie should have it from the public treasury, on binding over their lands to double the value. Under Cæsar, the lands were the money which paid all debts: Under Tiberius, ten thousand sesterces in land became as current money, equal to sive thousand sesterces in silver.

The magna charta of England provides against the seising the lands or revenues of a debtor, when his moveable or personal goods are sufficient to pay, and he is willing to give them up to his creditors: By this means all the goods of an Englishman

represented money.

The laws of the Germans constituted money a satisfaction for the injuries that were committed, and for the sufferings due to guilt. But as there was but very little specie in the country, they again constituted this money to be paid in goods or chattels. This we find appointed in a Saxon law, with certain regulations suitable to the ease and convenience of the several ranks of people. At first the law declared the value of a sou in cattle; the sou of two tremises answered to on ox of twelve months, or to an ewe with her lamb; that of three tremises was worth an ox of sixteen months. With these people money became cattle, goods, and merchandise; and these again became money.

Money is not only a fign of things; it is also a fign and representative of money, as we shall see in

the chapter on exchange.

^{*} Tacitus, lib. vi.

[†] The laws of the Saxons, chap. 18.

CHAP. III.

Of ideal money.

THERE is both real and ideal money. Civilized nations generally make use of ideal money, only because they have converted their real money into ideal. At first their real money was some metal of a certain weight and standard: But soon dishonesty or want made them retrench a part of the metal from every piece of money, to which they left the same name; for example, from a livre at a pound weight they took half the filver, and still continued to call it a livre; the piece which was the twentieth part of a pound of filver, they continued to call a fou, though it is no more the twentieth part of this pound of filver. By this means the livre is an ideal livre, and the fou an ideal fou. Thus of the other subdivisions; and so far may this be carried, that what we call a livre, may be only a small part of the original livre or pound, which renders it still more ideal. It may even happen, that we may have no piece of money of the precise value of a livre, nor any piece exactly worth a fou: Then the livre and the fou will be purely ideal. They may give to any piece of money the denomination of as many livres and as many fous as they please; the variation may be continual; because it is as easy to give another name to a thing, as it is difficult to change the thing itself.

To take away the fource of this abuse, it would be an excellent law for all countries, who are desirous of making commerce flourish, to ordain, that none but real money should be current; and to prevent any methods from being taken to render

it ideal.

Nothing ought to be so exempt from variation, as that which is the common measure of all.

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Trade is in its own nature extremely uncertain: and it is a great evil to add a new uncertainty to that which is founded on the nature of the thing.

CHAP. IV.

Of the quantity of gold and filver.

WHile civilized nations are the mistresses of the world, gold and silver, whether they draw it from amongst themselves, or fetch it from the mines, must increase every day. On the contrary, it diminishes when barbarous nations prevail. We know how great was the scarcity of these metals, when the Goths and Vandals on the one side, and on the other, the Saracens and Tartars, broke in like a torrent on the civilized world.

CHAP. V.

The same subject continued. Home s vice

THE bullion drawn from the American mines, imported into Europe, and from thence sent to the East, has greatly promoted the navigation of the European nations; for it is a merchandise which Europe receives in exchange from America, and which she sends in exchange to the Indies. A prodigious quantity of gold and silver is therefore an advantage, when we consider these metals as a merchandise: but 'tis otherwise when we consider them as a sign; because their abundance gives an allay to their quality as a sign, which is chiefly founded on their scarcity.

Before the first Punic war, copper was to + filver

⁺ See chap. 12. of this book.

as 960 to 1 *; it is at present nearly as 73 and a half to one. When the proportion shall be as it was formerly, filver will better perform its office as a sign.

CHAP. VI.

The reason why interest was lowered one half after the conquest of the Indies.

G Arcilasso informs us +, that in Spain, after the conquest of the Indies, the interest which was at ten per cent. fell to five. This was a necessary consequence. A great quantity of specie being all of a sudden brought into Europe, much sewer persons had need of money. The price of all things increased, while the value of money diminished: the proportion was then broken, and all the old debts were discharged. We may recollect the time of the system *, when every thing was at a high price except specie. Those that had money after the conquest of the Indies, were obliged to lower the price or hire of their merchandise; that is, in other words, their interest.

From this time they were unable to bring interest to its ancient standard, because the quantity of specie brought to Europe has been annually increasing. Besides, as the public sunds of some states, founded on riches procured by commerce, give but a very small interest, it became necessary for the contracts of individuals to be regulated by these. In

^{*} Supposing a mark, or eight ounces of silver, to be worth forty-nine livres, and copper twenty fols per pound.

[†] History of the civil wars of the Spaniards in the Well-Indies.

^{*} In France, Mr. Law's project was called by this name.

fhort, the course of exchange having rendered the conveying of specie from one country to another remarkably easy, money cannot be scarce in a place where they may be so readily supplied with it, by those who have it in plenty.

CHAP. VII.

How the price of things is fixed in the variation of the fign of riches.

Money is the price of merchandises or manufactures. But how shall we fix this price? or, in other words, by what piece of money is every

thing to be represented?

If we compare the mass of gold and filver in the whole world, with the quantity of merchandise therein contained, it is certain, that every commodity or merchandise in particular, may be compared to a certain portion of the entire mass of gold and filver. As the total of the one is to the total of the other, fo part of the one will be to part of the other. Let us suppose, that there is only one commodity or merchandise in the world, or only one to be purchased, and that this is divisible like money: a part of this merchandife will answer to a part of the mass of gold and silver; the half of the total of the one, to the half of the total of the other; the tenth, the hundredth, the thousandth part of the one, to the tenth, the hundredth, the thousandth part of the other. But as that which constitutes property amongst mankind, is not all at once in trade; and as the metals or money, which are the fign of property, are not all in trade at the same time; the price is fixed in the compound ratio of the total of things with the total of figns, and that of the total of things in trade with the total of figns in trade also: And as the things which are not

not in trade to day may be in trade to-morrow, and the figns not now in trade may enter into trade at the fame time, the establishment of the price of things always fundamentally depends on the proportion of the total of things to the total of figns.

Thus the prince or the magistrate can no more ascertain the value of the merchandises, than he can establish by a decree that the relation one has to ten, is equal to that of one to twenty. Julian's

* lowering the price of provisions at Antioch, was

the cause of a most terrible famine.

CHAP. VIII.

The same subject continued.

THE negroes on the coast of Africa have a sign of value without money. It is a sign merely ideal, founded on the degree of esteem which they six in their minds for every merchandise, in proportion to the need they have of it. A certain commodity or merchandise is worth three macoutes; another six macoutes, another ten macoutes; that is, as if they said simply three, six, and ten. The price is formed by a comparison of all merchandises with each other. They have therefore no particular money; but each kind of merchandise is money to the other.

Let us for a moment transfer to ourselves this manner of valuing things, and join it to ours: all the merchandises and goods in the world, or else all the merchandises or manufactures of a state, particularly considered as separate from all others, would be worth a certain number of macoutes; and, dividing the money of this state into as many parts as there are macoutes, one part of this division of

money will be the fign of a macoute.

^{*} History of the church by Socrates.

If we suppose the quantity of specie in a state doubled, it will be necessary to double the specie in the macoute; but if, in doubling the specie, you double also the macoute, the proportion will remain the same as before the doubling of either.

If, fince the discovery of the Indies, gold and filver have increased in Europe in the proportion of one to twenty, the price of provisions and merchandises must have been inhanced in proportion of one to twenty. But if, on the other hand, the number of merchandises has increased as one to two, it necessarily follows, that the price of these merchandises and provisions having been raised in proportion of one to twenty, and fallen in proportion of one to two, it necessarily follows, I say, that the proportion is only as one to ten.

The quantity of goods and merchandifes increases by an augmentation of commerce, the augmentation of commerce by an augmentation of the specie, which successively arrives, and by new communications, with fresh discovered countries and seas, which surnish us with new commodities and new

merchandises.

CHAP. IX.

Of the relative scarcity of gold and silver.

BEsides the positive plenty and scarcity of gold and silver, there is still a relative abundance, and a relative scarcity of one of these metals com-

pared to the other.

The avaricious hoard up their gold and filver, because as they do not care to spend, they are fond of signs that are not subject to decay. They preser gold to silver, because, as they are always as a losing, they can best conceal that which takes up the least room. Gold therefore disappears when there is plenty of silver, because every one has

fome to conceal; it appears again when filver is fcarce, because they are obliged to draw it from its confinement.

It is then a rule, That gold is common when filver is scarce, and gold is scarce when filver is common. This lets us see the difference between their relative and their real abundance and scarcity, of which I shall presently speak more at large.

CHAP. X.

Of exchange.

THE relative abundance and scarcity of specie in different countries forms what is called the course of exchange,

Exchange is a fixing of the actual and momen-

tary value of money.

Silver, as a metal, has a value like all other merchandifes, and an additional value, as it is capable of becoming the fign of other merchandifes. If it was no more than a mere merchandife, it would no doubt, lose much of its value.

Silver, as money, has a value, which the prince in some respects can fix, and in others he can-

not.

The prince establishes a proportion between a quantity of silver as metal, and the same quantity as money. 2. He fixes the proportion between the several metals made use of as money. 3. He establishes the weight and standard of every piece of money. In sine, 4. He gives to every piece that ideal value, of which I have spoken. I shall call the value of money in these four respects its positive value, because it may be fixed by law.

The coin of every state has, besides this, a relative value, as it is compared with the money of other countries. This relative value is established by the exchange; and greatly depends on its positive value. It is fixed by the general opinion of the merchants, never by the decrees of the prince; because it is subject to incessant variations, and de-

pends on a thousand accidents.

The several nations, in fixing this relative value, are chiefly guided by that which has the greatest quantity of specie. If she has as much specie as all the others together, it is then most proper for the others to regulate theirs by her standard; and the regulation between all the others will pretty nearly agree with the regulation made with this principal nation.

In the actual state of the universe, * Holland is the nation we are speaking of. Let us examine the

course of exchange with relation to her.

They have in Holland a piece of money called a florin, worth twenty fous, or forty half-fous or gros. But, to render our ideas as simple as possible, let us imagine that they have not any fuch piece of money in Holland as a florin, and that they have no other but the gros: a man who should have a thousand florins, would have forty thousand gross; and fo of the rest. Now the exchange with Holland is determined by our knowing how many gros every piece of money in other countries is worth; and as the French commonly reckon by a crown of three livres, the exchange makes it necessary for them to know how many gros are contained in a crown of three livres. If the course of exchange is at fifty-four, a crown of three livres will be worth fifty-four gros; if it is at fixty, it will be worth fixty gross. If filver is scarce in France, a crown of three livres will be worth more gros; if plentiful, it will be worth less.

^{*} The Dutch regulate the exchange for almost all Europe, by a kind of determination amongst themfelves, in a manner most agreeable to their own interests.

This

This scarcity or plenty, from whence results the mutability of the course of exchange, is not the real, but a relative scarcity or plenty. For example; when France has greater occasions for funds in Holland, than the Dutch of having funds in France, specie is said to be common in France, and

scarce in Holland; and vice versa.

Let us suppose that the course of exchange with Holland is at fifty-four. If France and Holland composed only one city, they would act as we do when we give change for a crown: The Frenchman would take three livres out of his pocket, and the Dutchman fifty-four gros from his. But as there is some distance between Paris and Amsterdam, it is necessary that he who for my crown of three livres, gives me fifty-four gros which he has in Holland, should give me a bill of exchange for fifty-four gros payable in Holland, The fifty-four gros is not the thing in question; but a bill for that Thus, in order to judge of the + scarcity or plenty of specie, we must know if there are in France more bills of fifty-four gros drawn upon Holland, than there are crowns drawn upon France. If there are more bills from Holland than there are from France, specie is scarce in France, and common in Holland; it then becomes necessary that the exchange should rife, and that they give for my crown more than fifty-four gros; otherwise I will not part with it, and vice verfa.

Thus the various turns in the course of exchange form an account of debtor and creditor, which must be frequently settled; and which the state in debt can no more discharge by exchange, than an individual can pay a debt by giving change for a

piece of filver.

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[†] There is much specie in a place, when there is more specie than paper; there is little, when there is more paper than specie:

We will suppose that there are but three states in the world, France, Spain, and Holland; that several individuals in Spain are indebted to France to the value of one hundred thousand * marks of silver; and that several individuals of France owe in Spain one hundred and ten thousand marks: now, if some circumstance both in Spain and France should cause each suddenly to withdraw his specie, what will then be the course of exchange? These two nations will reciprocally acquit each other of an hundred thousand marks; but France will still owe ten thousand marks in Spain, and the Spaniards will still have bills upon France to the value of ten thousand marks; while France will have none at all upon Spain.

But if Holland was in a contrary fituation with respect to France, and in order to balance the account must pay her ten thousand marks, the French would have two ways of paying the Spaniards; either by giving their creditors in Spain bills for ten thousand marks upon their debtors in Holland, or else by sending specie to the value of ten thousand

marks to Spain.

From hence it follows, that when a state has occasion to remit a sum of money into another country, it is indifferent in the nature of the thing, whether specie be conveyed thither, or they take bills of exchange. The advantage or disadvantage of these two methods solely depends on actual circumstances. We must inquire which will yield most gros in Holland, money carried thither in specie, or a bill upon Holland for the like sum †.

When money of the fame standard and weight in France yields money of the same standard and weight in Holland, we say that the exchange is at

* A mark is a weight of eight ounces.

⁺ With the expense of carriage and insurance de-

par. In the actual state of specie *, the par is nearly at fifty-four gros to the crown. When the exchange is above fifty-four gros, we say it is high;

when beneath, we fay it is low.

In order to know the loss and gain of a state, in a particular fituation of exchange, it must be confidered as debtor and creditor, as buyer and feller. When the exchange is below par, it lofes as a debtor, and gains as a creditor, it lofes as a buyer, and gains as feller. It is obvious, it lotes as debtor: Suppose, for example, France owes Holland a certain number of gros, the fewer gros there are in a crown, the more crowns she has to pay. On the contrary, if France is creditor for a certain number of gros, the less number of gros there are in a crown, the more crowns she will receive. The state loses also as buyer; for there must be the same number of gros, to buy the fame quantity of merchandifes; and while the exchange is low, every French crown is worth fewer gros. For the same reason the state gains as a feller: I fell my merchandise in Holland for a certain number of gros; I receive then more crowns in France, when for every fifty gros I receive a crown, than I should do if I received only the same crown for every fifty four. The contrary to this takes place in the other state. If the Dutch are indebted a certain number of crowns to France, they will gain; if they are owing to them, they will lose; if they fell, they lofe, and if they buy, they gain.

It is proper to pursue this something farther. When the exchange is below par; for example, if it is at fifty instead of fifty-four, it should follow, that France, on sending bills of exchange to Holland for fifty-four thousand crowns, could buy merchandises only to the value of fifty thousand, and that, on the other hand, the Dutch sending the value of fifty thousand crowns to France, might buy fifty-four thousand, which makes a difference of

^{*} In 1744.

that is, a loss to France of more than :: fo that France would be obliged to fend to Holland ; more in specie or merchandise, than she would do was the exchange at par. And as the mischief must constantly increase, because a debt of this kind would bring the exchange still lower, France would in the end be ruined. It feems, I fay, as if this thould certainly follow; and yet it does not, because of the principle which I have + elsewhere established, which is, that states constantly lean towards a balance, in order to preserve their independency. Thus they borrow only in proportion to their ability to pay, and meafure their buying by what they fell: and taking the example from above, . if the exchange falls in France from fifty-four to fifty, the Dutch who buy merchandises in France to the value of a thousand crowns, for which they used to pay fifty-four thousand gros, would now pay only fifty thousand, if the French would consent to But the merchandise of France will rise insensibly, and the profit will be shared between the French and the Dutch; for when a merchant can gain, he eafily shares his profit: there arises then a communication of profit between the French and the Dutch. In the fame manner the French who bought merchandifes of Holland for fifty-four thousand gros, and who when the exchange was at fifty-four paid for them a thousand crowns, will be obliged to add + more in French crowns to buy the same merchandises. But the French merchant, being fensible of the loss he suffers, will take up less of the merchandise of Holland. The French and the Dutch merchant will then be both lofers, the ftate will infenfibly fall into a balance, and the lowering of the exchange will not be attended with those inconveniencies which we had reason to fear.

[†] See book 20. chap. 21.

A merchant may fend his stock into a foreign country when the exchange is below par, without injuring his fortune; because when it returns, he recovers what he had lost; but a prince, who sends only specie into a foreign country, which never can return, is always a loser.

When the merchants have great dealings in any country, the exchange there infallibly rifes. This proceeds from their entering into many engagements, buying great quantities of merchandites, and drawing upon foreign countries to pay for them.

A prince may amass great wealth in his dominions, and yet specie may be really scarce, and relatively common; for instance, if this state is indebted for many merchandises to a foreign country, the exchange will be low, tho' specie be scarce.

The exchange of all places conftantly tends to a certain proportion, and that in the very nature of things. If the course of exchange from Ireland to England is below par, and that of England to Holland is also under par, that of Ireland to Holland will be still lower; that is, in the compound ratio of that of Ireland to England, and that of England to Holland: for a Dutch merchant who can have his specie indirectly from Ireland by the way of England, will not chuse to pay dearer by having it the direct way. This, I fay, ought naturally to be the case: but however it is not exactly fo; there are always circumstances which vary these things; and the different profit of drawing by one place, or of drawing by another, constitutes the particular art and dexterity of the bankers, which does not belong to the present subject.

When a state raises its specie, for instance, when it gives the name of fix livres, or two crowns, to what was before called three livres, or one crown, this new denomination, which adds nothing real to the crown, ought not to procure a fingle gros more by the exchange. We ought only to have for the two new crowns, the same number of gros which

we before received for the old one. If this does not happen, it must not be imputed as an effect of the regulation itself, but to the novelty and suddenness of the affair. The exchange adheres to what is already established, and is not altered till after a certain time.

When a flate, instead of only raising the specie by a law, calls it in, in order to diminish its fize, it frequently happens that, during the time taken up in its paffing again through the mint, there are two kinds of money; the large, which is the old, and the small which is the new; and as the large is cried down, and is not to be received, but at the mint, and bills of exchange must be confequently paid in the new, one would imagine then that the exchange should be regulated by the new. If, for example, in France the ancient crown of three livres being worth in Holland fixty gros, were reduced one half, the new crown ought to be valued only On the other hand, it feems as if the at thirty. exchange ought to be regulated by the old coin; because the banker who has specie, and receives bills, is obliged to carry the old coin to the mint, in order to change it for the new; by which he The exchange then ought to be must be a loser. fixed between the value of the old coin and that of The value of the old is decreased, if we may call it fo, both because their is already some of the new in trade, and because the bankers cannot keep up to the rigour of the law; having an interest in letting loose the old coin from their chefts, and being even fometimes forced to make payments with it. Again, the value of the new specie must rise; because the banker having this, finds himfelf in a fituation, in which, as we shall immediately prove, he will reap great advantage by procuring the old. The exchange should then be fixed, as I have already faid, between the new and the old coin. For then the bankers find it for their interest, to fend the old out of the kingdom; because by this means they procure the same advantage as they could receive from a regular exchange of the old specie, that is, a great many gros in Holland, and in return a regular exchange a little lower, between the old and the new specie, which will

bring many crowns in France.

Suppose that three livres of the old coin yield by the actual exchange forty-five gros, and that by sending this same crown to Holland they receive sixty; but with a bill of forty-five gros, they procure a crown of three livres in France, which being sent in the old specie to Holland, still yields sixty gros: Thus all the old specie would be sent out of the kingdom, and the bankers would run away with

the whole profit.

To remedy this, new measures must be taken. The state which coined the new specie, would itself be obliged to fend great quantities of the old to the nation which regulates the exchange, and by thus, gaining credit there, raise the exchange pretty nearly to as many gros for a crown of three livres as could be got by sending a crown of three livres of the old specie out of the country. I say, to nearly the same; for, while the profits are small, the bankers will not be tempted to send it abroad, because of the expence of carriage, and the danger of confiscation.

It is fit that we should give a very clear idea of this. Mr. Bernard, or any other banker employed by the state, proposes bills upon Holland, and gives them at one, two, or three gros higher than the actual exchange; he has made a provision in a foreign country by means of the old specie which he has continually been sending thither; and thus he has raised the exchange to the point we have just mentioned. In the mean time, by disposing of his bills, he seizes on all the new specie, and obliges the other bankers who have payments to make, to carry their old specie to the mint, and, as he insensi-

bly obtains all the specie, he obliges the other bankers in their turn to give him bills at a very high exchange. By this means, his profit in the end compensates in a great measure for the loss he suf-

fered at the beginning.

It is evident, that, during these transactions, the state must be in a dangerous criss. Specie must become extremely scarce, 1. Because much the greatest part is cried down: 2. Because a part will be sent into foreign counties: 3. Because every one will lay it up, as not being willing to give that prosit to the prince, which he hopes to receive himself. It is dangerous to do it slowly; and dangerous also to do it in too much haste. If the supposed gain be immoderate, the inconveniencies increase in proportion.

We fee, from what has been already faid, that when the exchange is lower than the specie, a profit may be made by sending it abroad; for the same reason, when it is higher than the specie, there is

a profit in caufing it to return.

But there is a case in which profit may be made by sending the specie out of the kingdom, when the exchange is at par; that is, by sending it into a foreign country to be coined over again. When it returns, an advantage may be made of it, whether it be circulated in the country, or paid for

foreign bills.

If a company has been erected in a state with a prodigious stock, and this stock has in a few months been raised twenty or twenty-five times above the original purchase; if again the same state established a bank, whose bills were to perform the office of specie, while the numerary value of these bills was prodigious in order to answer to the numerary value of the stocks, (this is Mr. Law's system); it would follow from the nature of things, that these stocks and these bills would vanish in the same manner as they arose. Stocks cannot suddenly be raised twenty or twenty five times above their original value.

value, without giving a number of people the means of procuring immense riches in paper: every one would feek to fecure his fortune; and as exchange offers the most easy way of removing it from home. or conveying it whether one pleases, people would inceffantly remit a part of their effects to the nation that regulates the exchange. A project for making continual remittances into a foreign country, must lower the exchange. Let us suppose, that at the time of the system, in proportion to the flandard and weight of the filver coin, the exchange was fixed at forty gros to the crown; when a vast quantity of paper became money, they were unwilling to give more than thirty-nine gros for a crown, and afterwards thirty-eight, thirty-feven, &c. This proceeded fo far, that after a while they would give but eight gros, and, at last, there was no exchange at all.

The exchange ought, in this case, to have regulated the proportion between the specie and the paper of France, I suppose, that, by the weight and standard of the silver, the crown of three livres in silver was worth forty gros, and that the exchange being made in paper, the crown of three livres in paper was worth only eight gros, the difference was four fifths. The crown of three livres in paper was then worth four fifths less than the crown

of three livres in filver.

CHAP. XI.

Of the proceedings of the Romans with respect to money.

HOW great foever the exertion of authority has been in our times, with respect to the specie of France, during the administration of two successive ministers, still it was vastly exceeded by the Romans; not at the time when corruption had crept into their republic, nor when they were in a state of anarchy; but when they were, as much by Vol. II.

their wisdom as their courage, in the full vigour of their constitution, after having conquered the cities of Italy, and at the very time that they disputed the empire with the Carthaginians.

And here I am pleased that I have an opportunity of examining more closely into this matter, that no example may be taken from what can never

justly be called one.

In the first Punic war, the * as, which ought to be twelve ounces of copper, weighed only two, and in the second it was no more than one. This retrenchment answers to what we now call the raising of coin. To take half the silver from a crown of fix livres, in order to make two crowns, or to raise it to the value of twelve livres, is precisely the

fame thing.

They have left us no monument of the manner in which the Romans conducted this affair in the first Punic war; but what they did in the second, is a proof of the most consummate wisdom. republic found herfelf under an impossibility of paying her debts; the as weighed two ounces of copper, and the denarius valued at ten affes, weighed twenty ounces of copper. The republic, being willing to gain half on her creditors, made the as of an ounce of copper, and by this means paid the value of a denarius with ten ounces. This proceeding must give a great shock to the state; they were obliged therefore to break the force of it, as well as they could. It was in itself unjust, and it was necessary to render it as little so as polfible. They had in view the deliverance of the republic, with respect to the citizens; they were not therefore obliged to direct their view to the deliverance of the citizens, with respect to each other. This made a fecond step necessary. It was ordained, that the denarius, which hitherto contained

^{*} Pliny's natural history, l. xxxiii. art. 13.

but ten asses, should contain sixteen. The result of this double operation was, that while the creditors of the republic lost one half *, those of individuals lost only a fifth +; the price of merchandises was increased only a fifth; the real change of the money was only a fifth. The other consequences are obvious.

The Romans then conducted themselves with greater prudence than we, who in our transactions involved both the public treasure, and the fortunes of individuals. But this is not all; their affairs were carried on amidst more favourable circum-

stances than ours.

CHAP. XII.

The circumstances in which the Romans changed the value of their specie.

THERE was formerly very little gold and filver in Italy. This country has few or no mines of gold or filver. When Rome was taken by the Gauls, they found only a thousand ‡ weight of gold: And yet the Romans had sacked many powerful cities, and brought home their wealth. For a long time they made use of none but copper-money; and it was not till after the peace with Pyrrhus, that they had silver enough to make | money; they made denarii of this metal of the value of ten asses §, or ten pounds of copper. At that

† Pliny, l. xxxiii. art. 5.

Freinshemius, lib. v. dec. 2.

^{*} They received ten ounces of copper for twenty.
† They received fixteen ounces of copper for twenty.

[§] Freinshemius, lib. v. decad. 2. They struck alfo, says the same author, half denarii, called quinarii, and quarters, called sesterces.

time the proportion of filver was to that of copper, as I to 960. For as the Roman denarius was valued at ten affes, or ten pounds of copper, it was worth one hundred and twenty ounces of copper; and as the same denarius was valued only at one eighth of an ounce of silver *; this produced the

above proportion.

When Rome became mistress of that part of Italy which is nearest to Greece and Sicily, by degrees the found herfelf between two rich nations, the Greeks and the Carthaginians. Silver increased at Rome; and as the proportion of 1 to 960 between filver and copper could be no longer supported, the made feveral regulations with respect to money. which to us are unknown. However, at the beginning of the fecond Punic war, the + Roman denarius was worth no more than twenty ounces of copper; and thus the proportion between filver and copper was no longer but as 1 to 160. The reduction was very confiderable, fince the republic gained five-fixths upon all copper-money. But she did only what was necessary in the nature of things, by establishing the proportion between the metals made use of as money.

The peace which terminated the first Punic war, left the Romans masters of Sicily. They soon entered Sardinia; afterwards they began to know Spain; and thus the quantity of silver increased at Rome. They took measures to reduce the ‡ denatius from twenty ounces to sixteen, which had the effect of putting a nearer proportion between silver and copper; by this means the proportion which was before as 1 to 160, was now made as 1 to

128.

t Ibid.

^{*} An eighth, according to Budæus; according to other authors, a feventh.

⁺ Pliny's nat. hist. 1. xxxiii. art. 13.

CHAP. XIII.

Proceedings with respect to money in the time of the Emperors.

IN the changes made in the specie during the time of the republic, they proceeded by diminishing it: The state reposed in the people the knowledge of its wants, and did not pretend to deceive them. Under the Emperors they proceeded by way of allay. These princes, reduced to despair, even by their liberalities, found themselves obliged to degrade the specie; an indirect method, which diminished the evil, without seeming to touch it. They withheld a part of the gift, and yet concealed the hand that did it; and, without speaking of the diminution of the pay, or of the gratuity, it was found diminished.

We even still see * in cabinets a kind of medals, which are called plated; and are only pieces of copper covered with a thin plate of filver. This money is mentioned in a fragment of the 77th book

of Dio +.

Didius Julian first began to debase it. We find that the coin of ‡ Caracalla had an allay of more than half; that of Alexander Severus ||, of two thirds: The debasing still increased, till, under Gallienus §, nothing was to be seen but copper silvered over.

It is evident, that fuch violent proceedings could

* See Father Jourbet's science of medals, Paris, 1739, p. 59.

† Extract of virtues and vices.

‡ See Savotte, part 2. chap. 12. and Le Journal des Scavans of the 28th of July 1681, on a discovery of fifty thousand medals.

See Savotte, ibid. 6 Ibid.

not take place in the present age; a prince might deceive himself, but he could deceive no body else. The exchange has taught the banker to draw a comparison between all the money in the world. and to establish its just value. The standard of monev can no longer be a fecret. Were the prince to begin to allay his filver, every body elfe would continue it, and do it for him; the specie of the true standard would go abroad first, and nothing would be fent back but base metal. If, like the Roman Emperors, he debased the filver, without debasing the gold, the gold would fuddenly disappear, and he would be reduced to his bad filver. change, as I have faid in the preceding book *, has deprived princes of the opportunity of fhewing great exertions of authority, or at least has renderedithem ineffectual.

CHAP. XIV.

How the exchange is a confraint on despotic power.

MUSCOVY would have descended from its defpotic power, but could not. The establishment of commerce depended on that of the exchange, and the transactions of exchange were inconsistent with all its laws.

In 1745, the Czarina made a law to expel the Jews, because they remitted into foreign countries the specie of those who were banished into Siberia, as well as that of the foreigners entertained in her service. As all the subjects of the empire are slaves, they can neither go abroad themselves, nor send away their effects without permission. The exchange which gives them the means of remitting their specie from one country to another, is therefore entirely incompatible with the laws of Muscovy.

^{.*} Cap. 16.

tance

Commerce itself is inconsistent with the Russian laws. The people are composed only of slaves employed in agriculture, and of slaves called ecclesiatics, or gentlemen, who are the lords of those slaves: There is then nobody left for the third estate, which ought to be composed of mechanics and merchants.

CHAP. XV.

The practice of some countries in Italy.

THEY have made laws in some parts of Italy to prevent subjects from selling their lands, in order to remove their specie into foreign countries. These laws may be good when the riches of a state are fo connected with the country itself, that there would be great difficulty in transferring them to an-But fince, by the course of exchange. riches are in some degree independent on any particular state, and fince they may with so much ease be conveyed from one country to another; that must be a bad law which will not permit persons for their own interest to dispose of their lands, while they can dispose of their money. It is a bad law, because it gives an advantage to moveable effects, in prejudice to the land; because it deters strangers from fettling in the country, and, in thort, because it may be eluded.

CHAP. XVI.

The affiftance a state may derive from bankers.

THE bankers business is to change, not to lend money. If the prince makes use of them to exchange his specie, as he never does it but in great affairs, the least profit he can give for the remit-

tance, becomes considerable; and if they demand large profits, we may be certain that there is a fault in the administration. On the contrary, when they are employed to advance specie, their art consists in procuring the greatest profit for the use of it, without being liable to be charged with usury.

CHAP. XVII.

Of public debts.

SOME have imagined that it was for the advantage of a state to be indebted to itself: They shought that this multiplied riches by increasing the circulation.

Those who are of this opinion, I believe, confounded a circulating paper which represents money, or a circulating paper which is the sign of the profits that a company has, or will make by commerce, with a paper which represents a debt. The two first are extremely advantageous to the state: The last can never be so; and all that we can expect from it is, that individuals have a good security from the government for their payment. But let us see the inconveniencies which result from it.

1. If foreigners possess much paper which reprefents a debt, they annually draw out of the nation a considerable sum for the interest.

2. A nation that is thus perpetually in debt, must

have the exchange very low.

3. The taxes raifed for the payment of the interest of the debt, are a hurt to the manufactures,

by raifing the price of the artificers labour.

4. It takes the true revenue of the state from those who have activity and industry, to convey it to the indolent; that is, it gives the conveniencies for labour to those who do not labour, and closs with difficulties the industrious artist.

Thefe

These are its inconveniencies: I know of no advantages. Ten persons have each a yearly income of a thousand crowns, either in land or trade; this raises to the nation at five per cent. a capital of two hundred thousand crowns. If these ten persons employed the half of their income, that is, five thousand crowns, in paying the interest of an hundred thousand crowns, which they had borrowed of others, that would be only to the state as two hundred thousand crowns; that is, in the language of the Algebraists, 200,000 crowns—100,000 crowns—100,000 crowns—200,000 crowns.

People are thrown perhaps into this errour, by reflecting that the paper which represents the debt of a nation is the sign of riches; for none but a rich state can support such paper without falling into decay. And if it does not fall, it is a proof that the state has other riches besides. They say that it is not an evil, because there are resources against it; and that is an advantage, because these resources.

CHAP. XVIII.

Of the payment of public debts.

IT is necessary, that there should be a proportion between the state as creditor, and the state as debtor. The state may be a creditor to infinity, but it can only be a debtor to a certain degree; and when it surpasses that degree, the title of creditor vanishes.

If the credit of the state has never received the least blemish, it may do what has been so happily practised in one of the kingdoms * of Europe; that is, it may acquire a great quantity of specie, and offer to reimburse every individual, at least if they

ces furpass the evil.

^{*} England. Vol. II.

will not reduce their interest. When the state borrows, the individuals fix the interest; when it pays, the interest for the future is fixed by the state.

It is not fufficient to reduce the interest: It is necessary to erect a finking fund from the advantage of the reduction in order to pay every year a part of the capital: A proceeding so happy, that its success increases every day.

When the credit of the state is not entire, there is a new reason for endeavouring to form a sinking fund, because this fund being once established,

will foon procure the public confidence.

If the state is a republic, the government of which is in its own nature consistent with its entering into projects of a long duration, the capital of the sinking fund may be inconsiderable: But it is necessary in a monarchy for the capital to be much greater.

2. The regulations ought to be so ordered, that all the subjects of the state may support the weight of the establishment of these funds, because they have all the weight of the establishment of the debt; thus the creditor of the state, by the sums he con-

tributes, pays himfelf.

3. There are four classes of men, who pay the debts of the state: The proprietors of the land, those engaged in trade, the labourers and artificers, and, in fine, the annuitants either of the state or of private people. Of these four classes the last, in a case of necessity, one would imagine, ought least to be spared; because it is a class entirely passive, while the state is supported by the active vigour of the other three. But as it cannot be higher taxed without destroying the public considence, of which the state in general, and these three classes in particular, have the utmost need; as a breach in the public saith cannot be made on a certain number of subjects, without seeming to be made on all; as

the class of creditors is always the most exposed to the projects of ministers, and always in their eye, and under their immediate inspection, the state is obliged to give them a singular protection, that the part which is indebted may never have the least advantage over that which is the creditor *.

CHAP. XIX.

Of lending upon interest.

SPECIE is the fign of value. It is evident, that he who has occasion for this fign ought to pay for the use of it, as well as for every thing else that he has occasion for. All the difference is, that other things may be either hired or bought; whilst money, which is the price of things, can only be hired, and not bought *.

To lend money without interest, is certainly an action laudable, and extremely good; but it is obvious, that it is only a counsel of religion, and not

a civil law.

In order that trade may be fuccessfully carried on, it is necessary that a price be fixed on the use of specie; but this price should be very inconsiderable. If it be too high, the merchant who sees that it will cost him more in interest than he can gain by commerce, will undertake nothing. If there is no consideration to be paid for the use of specie, no body will lend it; and here too the merchant will undertake nothing.

I am mistaken when I say nobody will lend: The affairs of society must ever make it necessary. Usury will be established; but with all the disorders with which it has been constantly attended.

^{*} We speak not here of gold and silver considered as a merchandise.

The laws of Mahomet confound usury with lending upon interest. Usury increases in Mahometan countries in proportion to the severity of the prohibition. The lender indemnisses himself for the danger he undergoes of suffering the penalty.

In those eastern countries, the greatest part of the people are secure of nothing; there is hardly any proportion between the actual possession of a sum, and the hope of receiving it again after having lent it: Usury then must be raised in proportion to the danger of insolvency.

CHAP. XX.

Of maritime usury.

THE greatness of maritime usury is founded on two things: The danger of the sea, which makes it proper that those who expose their specie, should not do it, without considerable advantage; and the ease with which the borrower, by the means of commerce, speedily accomplishes a variety of great affairs. But usury, with respect to landmen, not being sounded on either of these two reasons, is either prohibited by the legislators, or, what is more rational, reduced to proper bounds.

CHAP. XXI.

Of lending by contract, and the state of usury amongst the Romans.

BESIDES the loans made for the advantage of commerce, there is still a kind of lending by a civil contract, from whence results interest or ufury.

As

As the people of Rome increased every day in power, the magistrates sought to infinuate themselves into their favour by enacting such laws as were most agreeable to them. They retrenched capitals; first lowered, and at length prohibited interest; they took away the power of confining the debtor's body: In fine, the abolition of debts was contended for, whenever a tribune was disposed to

render himself popular.

These continual changes, whether made by the laws, or by the plebiscita, naturalized usury at Rome: For the creditors seeing the people their debtor, their legislator, and their judge, had no longer any considence in their agreements; the people, like a debtor who has lost his credit, could only tempt them to lend by allowing an exorbitant interest; especially as the laws applied a remedy to the evil only from time to time, while the complaints of the people were continual, and constantly intimidated the creditors. This was the cause that all honest means of borrowing and lending were abolished at Rome, and that the most monstrous usury established * itself in that city, notwithstanding the strict prohibition and severity of the law.

Cicero tells us, that in his time interest at Rome was at thirty-four per cent. and in the † provinces at forty-eight. This evil was a consequence of the severity of the laws against usury. Laws excessively good are the source of excessive evils. The borrower found himself under a necessity of paying for the interest of the money, and for the danger the creditor underwent of suffering the penalty of the

law.

^{*} Tacit. annal. lib. 6.

[†] Letters to Atticus, lib. 5. let. 21.

CHAP. XXII.

The same subject continued.

THE primitive Romans had not any laws to regulate the rate of usury *. In the contests which arose on this subject between the plebeians and the patricians, even in the † sedition on the Mons Sacer, nothing was alleged on the one hand but promise, and on the other but the severity of contracts.

They then only followed private agreements, which I believe were most commonly at twelve per cent. per annum. My reason is, that in the ‡ ancient language of the Romans, interest at fix per cent, was called half usury, and interest at three per cent. quarter usury. Total usury must there-

fore have been interest at twelve per cent.

But if it be asked, how such great interest could be established amongst a people almost without commerce? I answer, that this people, being very often obliged to go to war without pay, were under a frequent necessity of borrowing: And as they incessantly made happy expeditions, they were commonly very able to pay. This is visible from the recital of the contest which arose on this subject; they did not disagree concerning the avarice of creditors, but said that those who complained

^{*} Usury and interest amongst the Romans signified the same thing.

[†] See Dionysius Halic. who has described it so well. ‡ Usuræ semisses, trientes, quadrantes. See the feveral titles of the digests and codes on usury, and especially the 17th law, with the note st. de usuris.

might have been able to pay, had they lived in a

more * regular manner.

They then made laws, which had only an influence on the prefent fituation of affairs: They ordained, for inftance, that those who enrolled themselves for the war they were engaged in, should not be molested by their creditors; that those who were in prison should be set at liberty; that the most indigent should be sent into the colonies; and sometimes they opened the public treasury. The people, being eased of their present burthens, became appealed; and as they required nothing for the future, the senate were far from providing against it.

At the time when the senate maintained the cause of usury with so much constancy, the Romans were distinguished by an extreme love of frugality, poverty, and moderation: But the constitution was such, that the principal citizens alone supported all the expences of government, while the common people paid nothing. How then was it possible to deprive the former of the liberty of pursuing their debtors, and at the same time to oblige them to execute their offices, and to support the

republic amidst its most pressing necessities?

Tacitus says, that the law of the twelve tables sixed the interest at one per cent. It is evident that he was mistaken, and that he took another law, of which I am going to speak, for the law of the twelve tables. If this had been regulated in the law of the twelve tables, why did they not make use of its authority in the disputes which afterwards arose between the creditors and debtors? We find not any vestige of this law upon lending at interest; and let us have but ever so little knowledge of the history of Rome, we shall see that a

^{*} See Appius's speech on this subject in Dionysius Halicarnassus.

law like this could never be the work of the decem-

The Licinian law, made * eighty-five years after the law of the twelve tables, was one of those temporary laws of which we have spoken. It ordained, that what had been paid for interest should be deducted from the principal, and the rest discharged

by three equal payments.

In the year of Rome 398, the tribunes Duillius and Menenius caused a law to be passed, which reduced the interest to + one per cent. per annum. It is this law which Tacitus ‡ confounds with the law of the twelve tables, and this was the first ever made by the Romans to fix the rate of Interest. Ten years after ||, this usury was reduced one half §; and in the end entirely abolished ‡; and if we may believe some authors whom Livy had read, this was under the consulate of ++ C. Marcius Rutilius and P. Servilius, in the year of Rome 413.

It fared with this law as with all those in which the legislator carries things to excess: An infinite number of ways were found to elude it. They enacted therefore many others to confirm, correct, and temper it. Sometimes they quitted = the laws to follow the common practice, at others the common practice to follow the laws; but, in this case, custom

† Unciaria usura. Tit. Liv. lib. 7.

† Annal. lib. 6.

§ Semiunciaria ufura.

4 As Tacitus fays, Annal. lib. 6.

eafily

^{*} In the year of Rome 388. Tit. Liv. lib. 6.

[#] Under the confulate of L. Manlius Torquatus and C. Plautius, according to T. Liv. lib. 7. This is the law mentioned by Tacitus, Annal. lib. 6.

⁺ This law was passed at the instance of M. Genucius, tribune of the people. Tit. Liv. lib. 7. towards the end.

⁼ Veteri jam more fænus receptum erat. Appian on the civil war, lib. 1.

easily prevailed. When a man wanted to borrow, he found an obstacle in the very law made in his favour; this law must be evaded by the person it was made to succour, and by the person it condemned. Sempronius Aselus, the prætor, having permitted the * debtors to act in conformity to the laws, was † slain by the creditors for attempting to revive the memory of a severity that could no longer be supported.

Under Sylla, L. Valerius Flaccus made a law, which suffered interest to be at three per cent. per annum. This law the most moderate, the most equitable ever made on this account by the Romans, is disapproved by Paterculus ‡. But if this law was necessary for the advantage of the republic, if it was of service to every individual, if it formed an easy communication between the debtor and the creditor, it could not be unjust.

He pays least, says Ulpian |, who pays latest. This decides the question whether interest be law-

^{*} Permisit eos legibus agere. Appian, on the civil war, lib. 1. and the epitome of Livy, lib. 64.

⁺ In the year of Rome, 663.

[†] Turpissima legis autor, qua creditoribus quadrantem folvi jusserat, lib. 2. Some authors have interpreted this passage, as if the law of Flaccus had ordained, that they should only pay a fourth of the principal; but, in my opinion, this was not the language of the Latin authors. When the question was in relation to the reducing of debts, they made use of the words quadrans, triens, &c. to signify the usury; and tertia pars, and quarta pars, to point out the capital. 2. They made the consul Valerius the author of a law, which would scarcely have been made by a seditious tribune. 3. This was in the heat of a civil war, at a time when it was necessary to maintain the public credit, not to destroy it; a civil war, in short, that had no relation to the abolition of debts.

[|] Leg. 12. ff. de verb. fignif.

ful; that is, whether the creditor can fell time, and the debtor buy it.

BOOK XXIII.

Of Laws in the Relation they bear to the Number of Inhabitants.

CHAP. I.

Of men and animals with respect to the multiplication of their species.

DELIGHT of humankind, * and gods above, Parent of Rome, propitious Queen of Love!

For when the rifing fpring adorns the mead, And a new scene of nature stands display'd; When teaming buds, and chearful greens appear, And western gales unlock the lazy year; The joyous birds thy welcome first express, Whose native songs thy genial fire confess: Then favage beafts bound o'er their flighted food, Struck with thy darts, and tempt the raging flood: All Nature is thy gift, earth, air, and fea; Of all that breathes the various progeny Stung with delight, is goaded on by thee. O'er barren mountains, o'er the flow'ry plain, The leafy forest, and the liquid main, Extends thy uncontroul'd, and boundless reign. Through all the living regions thou dost move, And scatter'st where thou go'st, the kindly seeds of love.

^{*} Dryden's Lucr.

The females of brutes have an almost constant fecundity. But in the human species, the manner of thinking, the character, the passions, the human, the caprice, the idea of preserving beauty, the pain of child-bearing, and the fatigue of a too numerous family, obstruct propagation a thousand different ways.

CHAP. II.

Of marriage.

THE natural obligation of the father to provide for his children has established marriage, which makes known the person who ought to sulfil this obligation. The people * mentioned by Pomponius Mela † had no other way of discovering him but by resemblance.

Among civilized nations, the father ‡ is that person on whom the laws, by the ceremony of marriage, have fixed this duty, because they find

in him the man they want.

Amongst brutes this is an obligation which the mother can generally perform; but it is much more extensive amongst men. Their children indeed have reason; but this comes only by flow degrees. It is not sufficient to nourish them; we must also direct them: They can already live; but

they cannot govern themselves.

Illicit conjunctions contribute but little to the propagation of the species. The father who is under a natural obligation to nourish and educate his children, is not here fixed; and the mother, with whom the obligation remains, finds a thousand obstacles from shame, remorfe, the constraint of her sex, and the rigour of laws; and besides, she generally wants the means.

0 2

‡ Pater est quem nuptiæ demonstrant.

^{*} The Garamantes. † Lib. 1. cap. 8.

Women who have submitted to a public prostitution, cannot have the conveniency of educating their children: The trouble of education is incompatible with their station; and they are so corrupt, that they have no protection from the law.

It follows from all this, that public continence is naturally connected with the propagation of the species.

CHAP. III.

Of the condition of children.

IT is a dictate of reason, that when there is a marriage, children should follow the station or condition of the father; and that when there is not, they can belong to the mother only *.

CHAP. IV.

Of families.

IT is almost every where a custom for the wise to pass into the family of the husband. The contrary is without any inconveniency established at Formosa †, where the husband enters into the family of the wise.

This law, which fixes the family in a fuccession of persons of the same sex, greatly contributes, independently of the first motives, to the propagation of the human species. The family is a kind of property: A man who has children of a sex which does not perpetuate it, is never satisfied if he has not those who can render it perpetual.

* For this reason, among nations that have slaves, the child almost always follows the station or condition of the mother.

† Du Halde, tome I. p. 165.

Names, which give men an idea of a thing, which one would imagine ought not to perish, are extremely proper to inspire every family with a defire of extending its duration. There are people, amongst whom names distinguish families: there are others, where they only distinguish persons: these last have not the same advantage as the former.

CHAP. V.

Of the several orders of lawful wives.

L Aws and religion fometimes establish many kinds of civil conjunctions: and this is the case amongst the Mahometans, where there are several orders of wives, the children of whom are acknowleged by being born in the house, by civil contracts, or even by the slavery of the mother, and

the subsequent gratitude of the father.

It would be contrary to reason, that the law should stigmatize the children for what it approved in the father. All these children ought therefore to succeed, at least if some particular reason does not oppose it, as in Japan, where none succeed but the children of the wife given by the emperor. Their policy demands that the gifts of the emperor should not be too much divided, because they subject them to a kind of service, like that of our ancient siefs.

CHAP. VI.

Of laws in relation to bastards.

IN republics, where it is necessary that there should be the purest morals, bastards ought to be more degraded than in monarchies.

The

The laws made against them at Rome were perhaps too severe. But as the ancient institutions laid all the citizens under a necessity of marrying; and as marriages were also softened by the permission to repudiate, or make a divorce; nothing but an extreme corruption of manners could lead them to

concubinage.

It is observeable, that as the quality of a citizen was a very confiderable thing in a democratic government, where it carried with it the fovereign power, they frequently made laws in respect to the state of bastards, which had less relation to the thing itself, and to the honesty of marriage, than to the particular constitution of the republic. Thus the people have fometimes admitted baftards into the number * of citizens, in order to increase their power in opposition to the great. Thus the Athenians excluded bastards from the privilege of being citizens, that they might possess a greater share of the corn fent them by the king of Egypt. Aristotle informs us +, that in many cities were there was not a sufficient number of citizens, their bastards succeeded to their possessions; and that when there was a proper number, they did not fucceed.

CHAP. VII.

Of the father's consent to marriage.

THE consent of fathers is founded on their authority, that is, on their right of property. It is also founded on their love, on their reason, and on the uncertainty of that of their children,

† Ibid. lib.

^{*} Aristotle's Politics, lib. 6.

whom youth confines in a state of ignorance, and

paffion in a state of ebriety.

In the small republics, or singular institutions already mentioned, they might have laws which gave to magistrates that right of inspection over the marriages of the children of citizens, which nature had already given to fathers. The love of the public might there equal or surpass all other love. Thus Plato would have marriages regulated by the magistrates: this the Lacedæmonian magistrates

performed.

But, in common institutions, fathers have the disposal of their children in marriage: their prudence in this respect is always supposed to be superiour to the prudence of a stranger. Nature gives to fathers a desire of procuring successours to their children, when they have almost lost the desire of enjoyment themselves. In the several degrees of progeniture, they see themselves insensibly advancing to a kind of immortality. But what must be done if oppression and avarice arise to such a height as to usure all the authority of fathers? Let us hear what Thomas Gage * says in regard to the conduct of the Spaniards in the West-Indies.

"According to the number of the sons and daughters that are marriageable, the father's tribute is raised and increased, until they provide husbands and wives for their sons and daughters, who, as soon as they are married, are charged with tribute; which that it may increase, they will suffer none above sisteen years of age to live unmarried. Nay, the set time of marriage, appointed for the Indians, is at sourteen years for men, and thirteen for the woman, alleging that they are sooner ripe for the fruit of wedlock, and sooner ripe in knowledge and malice, and

^{*} A new furvey of the West-Indies by Thomas Gage, p. 345, edit, 3. "ftrength

"ftrength for work and service, than any other people. Nay, sometimes they force them to marry, who are scarce twelve and thirteen years of age, if they find them well limbed and strong in body, explaining a point of one of the canons, which alloweth sourteen and sisteen years, nife malitia suppleat extatem." He saw a list of these taken. It was, says he, a most shameful affair. Thus in an action which ought to be the most free, the Indians are the greatest slaves.

CHAP. VIII.

The same subject continued.

IN England, the law is frequently abused by the daughters marrying according to their own fancy, without consulting their parents. This custom is, I am apt to imagine, more tolerated there than any where else, from a consideration, that as the laws have not established a monastic celibacy, the daughters have no other state to chuse but that of marriage, and this they cannot refuse. In France, on the contrary, young women have always the resource of celibacy; and therefore the law which ordains that they shall wait for the consent of their sathers, may be more agreeable. In this light the custom of Italy and Spain must be less rational; convents are there established, and yet they may marry without the consent of their fathers.

CHAP. IX.

Of young women.

Young women who are conducted by marriage alone to liberty and pleasure; who have a mind which dares not think, a heart which dares

not feel, eyes which dare not fee, ears which dare not hear, who appear only to show themselves filly, condemned without intermission to trisles and precepts, have sufficient inducements to lead them on to marriage: it is the young men that want to be encouraged.

CHAP. X.

What it is that determines to marriage.

Wherever a place is found in which two persons can live commodiously, there they enter into marriage. Nature has a sufficient propensity to it, when unrestrained by the difficulty of subsistence.

A rising people increase and multiply extremely. This is, because with them it would be a great inconveniency to live in celibacy; and none to have many children. The contrary of which is the case when a nation is formed.

CHAP. XI.

Of the severity of government.

MEN who have absolutely nothing, such as beggars, have many children. This proceeds from their being in the case of a rising people: it costs the father nothing to give his art to his offspring, who even in their infancy are the instruments of this art. These people multiply in a rich or superstitious country, because they do not support the burthen of society; but are themselves the burthen. But men who are poor, only because they live under a severe government; who regard their fields less as the source of their subsistence, than as a cause of vexation; these men, I say, have Vol. II.

few children: they have not even subsistence for themselves, how then can they think of dividing it? they are unable to take care of themselves, when they are sick, how then can they attend to the wants of creatures whose infancy is a continual sickness?

It is pretended by some who are apt to talk of things which they have never examined, that the greater the poverty of the subjects, the more numerous are their families; that the more they are loaded with taxes, the more industriously they endeavour to put themselves in a station in which they will be able to pay them: two sophisms, which have always destroyed, and will for ever be the destruction of monarchies.

The feverity of government may be carried to fuch an extreme, as to make the natural fentiments destructive of the natural fentiments themselves. Would the women of * America have refused to bear children, had their masters been less cruel?

CHAP. XII.

Of the number of males and females in different countries.

Have already observed †, that there are born in Europe rather more boys than girls. It has been remarked, that in ‡ Japan there are born rather more girls than boys: all things compared, there must be more fruitful women in Japan than in Europe, and confequently it must be more populous.

We

^{*} A new furvey of the West-Indies by Thomas Gage, p 97. 3d edit.

[†] Book xvi. chap. 4. ‡ See Kempfer, who gives a computation of the people of Meaco.

We are informed *, that at Bantam there are ten girls to one boy. A disproportion like this must cause the number of families there to be to the number of those of other climates, as I to 5½; which is a prodigious difference. Their families may be much larger indeed; but there must be few men in circumstances sufficient to provide for so large a family.

CHAP. XIII.

Of sea-port towns.

IN sea-port towns, where men expose themselves to a thousand dangers, and go abroad to live or die in distant climates, there are sewer men than women: and yet we see more children there than in other places. This proceeds from the greater ease with which they procure the means of subsistence. Perhaps even the oily parts of fish are more proper to surnish that matter which contributes to generation. This may be one of the causes of the infinite number of people in † Japan and China ‡, where they live almost wholly on || fish. If this be the case, certain monastic rules, which oblige the monks to live on fish, must be contrary to the spirit of the legislator himself.

* Collection of voyages that contributed to the e-stablishment of the East-India company, vol. 1. p. 347.

+ Japan is composed of a number of isles, where there are many banks, and the sea is there extremely full of fish.

† China abounds in rivers.

See Du Halde, tom. 22. p. 139, 142.

CHAP. XIV.

Of the productions of the earth which require a greater or a less number of men.

PAsture-lands are but little peopled, because they find employment only for a few. Cornlands employ a great many men, and vineyards

infinitely more.

It has been a frequent complaint in England *, that the increase of pasture land diminished the inhabitants; and it has been observed in France, that the prodigious number of vineyards is one of the great causes of the multitude of people.

Those countries where coal-pits furnish a proper fubstance for fewel, have this advantage over others, that not having the same occasion for forests, the

lands may be cultivated.

In countries productive of rice, they are at great pains in watering the land; a great number of men must therefore be employed. Besides, there is less land required to furnish subsistence for a family, than in those which produce other kinds of grain. In fine, the land which is elsewhere employed in raising cattle, serves immediately for the subsistence of man; and the labour, which in other places is performed by cattle, is there performed by men; so that the culture of the soil becomes to man an immense manufacture.

^{*} The greatest number of the proprietors of land, says Bishop Burnet, finding more profit in felling their wool than their corn, inclosed their estates: the commons, ready to perish with hunger, rose up in arms; they insisted on a division of the lands: the young king even wrote on this subject: And proclamations were made against those who inclosed their lands. Abridg. of the hist. of the Reformation.

CHAP. XV.

Of the number of inhabitants with relation to the arts.

When there is an agrarian law, and the lands are equally divided, the country may be extremely well peopled, though there are but few arts, because every citizen receives from the cultivation of his land whatever is necessary for his subsistence, and all the citizens together consume all the fruits of the earth. Thus it was in some republics.

In our present fituation, in which lands are fo unequally distributed, they produce much more than those who cultivate them can confume; if the arts therefore should be neglected, and nothing minded but agriculture, the country could not be peopled. Those who cultivate, having corn to fpare, nothing would engage them to work the following year; the fruits of the earth would not be confumed by the indolent; for these would have nothing with which they could purchase them. It is necessary then that the arts should be established, in order that the produce of the land may be confumed by the labourer and the artificer. In a word, it is now proper that many should cultivate much more than is necessary for their own use. For this purpose, they must have a defire of enjoying fuperfluities; and these they can receive only from the artificer.

Those machines which are designed to abridge art, are not always useful. If a piece of workmanship is of a moderate price, such as is equally agreeable to the maker and the buyer, those machines which render the manufacture more simple, or, in other words, diminish the number of workmen, would be pernicious. And if water mills were not every where established, I should not have believed

believed them fo useful as is pretended, because they have deprived an infinite multitude of their employment, a vast number of persons of the use of water, and the greatest part of the land of its fertility.

CHAP. XVI.

The concern of the legislator in the propagation of the species.

REgulations on the number of citizens depend greatly on circumstances. There are countries in which nature does all: the legislator then can do nothing. What need is there of inducing men by laws to propagation, when a fruitful climate yields a sufficient number of inhabitants? Sometimes the climate is more favourable than the foil; the people multiply, and are destroyed by famine: this is the case of China. Hence a father sells his daughters, and exposes his children. In Tonquin * the same causes produce the same effect; so we need not, like the Arabian travellers mentioned by Renaudot, search for the origin of this in their sentiments to on the metempsychosis,

For the same reason, the religion of the isle of Formosa ‡ does not suffer the women to bring their children into the world, till they are thirty-sive years of age: the priestess before this age, by brui-

fing the belly, procures abortion.

+ Ibid. p. 167.

Dampiere's voyages, vol. 2. p. 41.

[†] See the collection of voyages that contributed to the establishment of the East-India company, vol. 1. part 1. page 182, & 188.

CHAP. XVII.

Of Greece, and the number of its inhabitants.

That effect which in certain countries of the East fprings from physical causes, was produced in Greece, by the nature of the government. The Greeks were a great nation, composed of cities, each of which had a diffinct government and feparate laws. They had no more the spirit of conquest and ambition, than those of Swifferland, Holland, and Germany, have at this day. In every republic the legislator had in view the happiness of the citizens at home, and their power abroad, left it should prove inferiour * to that of the neighbouring cities. Thus, with the enjoyment of a fmall territory and great happiness, it was easy for the number of the citizens to increase to such a degree as to become burthenfome. This obliged them incessantly to send out colonies; and, as the Swiss do now, to let their men out to war. Nothing was neglected that could hinder the too great multiplication of children.

They had amongst them republics, whose constitution was very remarkable. The nations they had subdued were obliged to provide subsistence for the citizens. The Lacedæmonians were fed by the Helotes, the Cretans by the Periecians, and the Thessalians by the Præneste. They were obliged to have only a certain number of freemen, that their slaves might be able to furnish them with subsistence. It is a received maxim in our days, that it is necessary to limit the number of regular troops: now the Lacædemonians were an army, maintained by the peasants: it was proper therefore that this army should be limited; without this the freemen, who

^{*} In valour, discipline, and military exercises.

had all the advantages of fociety, would increase beyond number, and the labourers be overloaded.

The politics of the Greeks were particularly employed in regulating the number of citizens. Plate in his republic fixes them at five thonfand and forty, and he would have them stop or encourage propagation, as was most convenient, by honours, shame, and the advice of the old men; he would even * regulate the number of marriages, in such a manner, that the republic might be recruited without being overcharged.

If the laws of a country, fays Aristotle †, forbid the exposing of children, the number of those brought forth ought to be limited. If they have more than the number prescribed by law, he advises ± to make the women miscarry before the fætus be

formed.

The same author mentions the infamous means made use of by the Cretans, to prevent their having too great a number of children; a precedent

too indecent to repeat.

There are places, fays Aristotle | again, where the laws give bastards the privilege of being citizens: but as soon as they have a sufficient number of people, this privilege ceases. The savages of Canada burn their prisoners, but when they have empty cottages to give them, they receive them into their nation.

Sir William Petty, in his calculations, supposes that a man in England is worth what he would sell for at Algiers †. This can be true only with respect to England. There are countries where a man is worth nothing, there are others where he is worth less than nothing.

^{*} Republic, lib. 5. † Polit. lib. vii.

[‡] Ibid. | Polit, lib iii. cap. 3.

[†] Sixty pounds Sterling.

CHAP. XVIII.

Of the state and number of people before the Romans.

ITaly, Sicily, Asia minor, Gaul, and Germany, were nearly in the same state as Greece, full of small nations that abounded with inhabitants; they had no need of laws to increase their number.

CHAP. XIX.

Of the depopulation of the universe.

ALL these little republics were swallowed up in a large one, and the universe insensibly became depopulated: in order to be convinced of this, we need only consider the state of Italy and Greece, before and after the victories of the Romans,

"You will ask me, fays Livy *, where the Vol"sci could find soldiers to support the war, after

- " having been so often defeated? There must have
- " been formerly an infinite number of people in those countries, which at present would be little
- " better than a defert, were it not for a few foldi-

" ers and Roman flaves."

"The oracles have ceased, says Plutarch, because the places where they spoke are destroyed. At

" present we can scarcely find in Greece three

" thousand men fit to bear arms."

- "I shall not describe, says Strabo +, Epirus, and the adjacent places; because these countries are entirely deserted. This depopulation, which
- " began long ago, still continues; so that the Roman soldiers incamp in the houses they have a-

† Lib. vii. pag. 496. We bandoned."

^{*} Lib. 6. Vol. II.

bandoned." We find, the cause of this in Polybius, who says, that Paulus Æmilius, after his victory, destroyed threescore and ten cities of Epirus, and carried away an hundred and fifty thousand slaves.

CHAP. XX.

That the Romans were under a necessity of making laws to encourage the propagation of the species.

THE Romans, by destroying others, were themfelves destroyed: incessantly in action, in the heat of battle, and in the most violent attempts, they wore out like a weapon kept constantly in use.

I shall not here speak of the attention with which they applied themselves to procure * citizens in the room of those they lost, of the associations they entered into, the privileges they bestowed, and of that immense nursery of citizens their slaves. I shall mention what they did to recruit the number, not of their citizens, but of their men; and as they were the people in the world who knew best how to adapt their laws to their projects, an examination of what they did in this respect cannot be a matter of indifference.

^{*} A modern author has treated of this in his confiderations on the causes of the rise and declension of the Roman grandeur.

CHAP. XXI.

Of the laws of the Romans relating to the propagation of the species.

THE ancient laws of Rome endeavoured greatly to incite the citizens to marriage. The fenate and the people made frequent regulations on this subject, as Augustus says in his speech related by Dio *.

Dionysius Halycarnassus † cannot believe, that after the death of three hundred and sive of the Fabii, exterminated by the Veientes, there remained no more of this family but one single child; because the ancient law which obliged every citizen to marry, and to educate all his children, was ‡ still in force.

Independently of the laws, the cenfors had a particular eye upon marriage, and according to the exigencies of the republic engaged them to it by +

shame and by punishments.

The corruption of manners that began to take place, contributed vastly to disgust the citizens against marriage, which was painful to those who had no taste for the pleasures of innocence. This is the purport of that speech * which Metellus Numidicus, when he was the censor, made to the people: " If it was possible for us to do without wives, " we should deliver ourselves from this evil: but

In the year of Rome 277.

^{*} Lib. 56. + Lib. 2.

[†] See what was done in this respect in T. Livius, lib. 45.; the Epitome of T. Livy, lib. 59.; Aulus Gellius, lib. 1. cap. 6.; Valerius Maximus, lib. ii. cap. 19.

^{*} It is in Aulus Gellius, lib. 1. cap. 6.

" as nature has ordained that we cannot live very happily with them, nor fubfift without them,

"we ought to have more regard to our own prefervation, than to transient gratifications."

The corruption of manners destroyed the censorship, which was itself established to destroy the corruption of manners: for when this corruption be-

came general, the cenfor loft his power *.

Civil discords, triumvirates, and proscriptions, weakened Rome more than any war she had hitherto engaged in. They left but few citizens, and the greatest part of them unmarried. To remedy this last evil, Casar and Augustus re-established the cenforship, and would even be + cenfors them Cæfar gave t rewards to those who had many children. All | women under forty-five years of age, who had neither husband nor children were forbid to wear jewels, or to ride in litters; an excellent method thus to attack celibacy by the power of vanity. The laws of Augustus & were more preffing: he imposed + new penalties on those who were not married, and increased the rewards both of those who were married and of those who had children. Tacitus calls thefe Julian laws +; to all appearance they were founded on the ancient regulations made by the fenate, the people, and the cenfors.

The law of Augustus met with innumerable obstacles, and thirty-four years ++ after it had been made, the Roman knights insisted on its being abo-

^{*} See what I have faid in book 5. chap. 19.

⁺ See Dio, lib. 43. and Xiphilinus in August.

[†] Dio, lib. 43. Suetonius, life of Cæfar, cap. 20. Appian lib. 2. of the civil war.

^{||} Eusebius in his chronicle.

[§] Dio lib. 54. 4 In the year of Rome 736.

⁺ Julias rogationes, Annal. lib. 3.

⁺⁺ In the year of Rome 762. Dio, lib. 56.

lished. He placed on one fide those who were married, and on the other those who were not: these last appeared by far the greatest number; upon which the citizens were astonished and confounded. Augustus, with the gravity of the ancient cen-

fors, addressed them in this manner *.

"While fickness and war fnatch away fo many " citizens, what must become of the city if marri-" ages are no longer contracted? The city does " not consist of houses, of porticoes, of publick " places; men alone constitute a city. You do " not fee men, like those mentioned in fable, ari-" fing out of the earth to take care of your affairs. "Your celibacy is not owing to the defire of living " alone; every one of you have both table and bed " companions. You only feek to enjoy your irre-" gularities undisturbed. Do you here cite the ex-" ample of the Vestal virgins? if you preserve not " the laws of chastity, you ought to be punished " like them. You are equally bad citizens, whe-" ther your example has an influence on the rest " of the world, or whether it be difregarded. " only view is the perpetuity of the republic. " have increased the penalties of those who have " disobeyed; and with respect to rewards, they are " fuch as I do not know whether virtue has ever " received greater. For less will a thousand " men expose life itself; and yet will not these " engage you to take a wife, and provide for " children ?"

He made a law, which was called after his name Julia, and Papia Poppaa from the names of the confuls † for part of that year. The greatness of the evil appeared in their being elected: Dio * tells

† Marcus Papius Mutius, and Q. Poppæus Sabinus.

Dio lib. 56. * Ibid.

^{*} I have abridged this speech, which is of a tedious length; it is to be found in Dio, lib. 56.

us, that they were not married, and that they had no children.

This law of Augustus was properly a code of laws, and a systematic body of all the regulations that could be made on this subject. The Julian * laws were incorporated into it; and received a greater strength. It was so extensive in its use, and had an influence on so many things, that it formed the finest part of the civil law of the Romans.

We find † parts of it dispersed in the precious f ragments of Ulpian, in the laws of the Digest, collected from authors who wrote on the Papian I aws, in the historians and others who have cited them, in the Theodosian code which abolished them, and in the works of the fathers who have censured them, without doubt from a laudable zeal for the things of the other life, but with very little knowledge of the affairs of this.

These laws had many heads ‡, of which we know thirty-five. But to return to my subject as speedily as possible, I shall begin with that head, which Aulus Gellius || informs us was the seventh, and which relates to the honours and rewards granted by that law. The Romans, who for the most part sprung from the cities of the Latins, which were Lacedæmonian § colonies, and who had received a part of their laws even from those cities ‡, had,

* The 14th title of the fragments of Ulpian distinguishes very rightly between the Julian and the Papian law.

† James Godfrey has made a collection of these. ‡ The 35th is cited in the 19th law ff. de ritu nuptiarum.

| Lib. ii. cap. 15. § Dionyf. Halycarnassus. 4 The deputies of Rome who were sent to search into the laws of Greece, went to Athens, and to the cities of Italy. like the Lacedæmonians, fuch veneration for old age, as to give it all honour and precedency. When the republic wanted citizens, they granted to marriage, and to a number of children, the privileges which had been given to age *. They granted fome to marriage alone, independently of the children which might fpring from it: This was called the right of husbands. They gave others to those who had any children, and larger still to those who had three children. These three things must not be confounded. These last had those privileges which married men constantly enjoyed, as for example, a particular place in the theatre +; they had those which could only be enjoyed by men who had children; and which none could deprive them of but those who had a greater number.

These privileges were very extensive. The married men who had the most children, were always preferred ‡, whether in the pursuit, or in the exercise of honours. The consul, who had the most numerous offspring, was the # first who received the fasces; he had his choice of the § provinces; the senator who had most children, had his name wrote first in the catalogue of senators, and was the first in giving his opinion ‡ in the senate. They might even stand sooner than ordinary for an office, because every child gave a dispensation of a year ++. If an inhabitant of Rome had three children, he was exempted from all troublesome offi-

^{*} Aulus Gellius, lib. ii. cap. 15. † Suetonius in Augusto, cap. 44.

[†] Tacitus, lib. ii. Ut numerus liberorum in candidatis præpolleret, quod lex jubebat.

Aulus Gellius, lib. ii. cap. 15.

[§] Tacitus, annal. lib. 15. ‡ See law 6. § 5. de decurion. † See law 2. ff. de minorb.

ces *. The freeborn women who had three children, and the freed women who had four, paffed + out of that perpetual tutelage, in which they had

been held t by the ancient laws of Rome.

As they had rewards, so they had also penalties ||. Those who were not married, could receive no advantage from the will of any person that was not a near relation s; and those who being married, had no children, could receive only half \(\psi\). The Romans, says Plutarch \(\psi\), marry to be heirs, and not to have them.

The advantages which a man and his wife might receive from each other — by will, were limited by law. If they had children of each other, they might receive the whole; if not, they could receive only a tenth part of the succession on the account of marriage; and if they had children by a former marriage, as many tenths as they had children.

If a husband absented himself of from his wife on any other cause than the affairs of the republic, he could not inherit from her.

- * Law 1. and 2. ff. de vacatione et excusat. mune; rum.
 - + Fragm. of Ulpian, tit. 29. § 3.

† Plutarch, life of Numa.

See the fragments of Ulpian, tit. 14, 15, 16, 17, & 18. which compose one of the finest pieces of the ancient civil law of the Romans.

Sozom. lib. i. cap. 9. they could receive from their

relations. Fragm. of Ulpian, tit. 16. § 1.

4 Sozom. lib. i. cap. 9. et leg. unic. cod. Theod. de infirm. pænis cælib. et orbit.

++ Moral works, of the love of fathers towards their children.

= See a more particular account of this in the fragm. of Ulpian, tit. 15, et 16.

Fragm. of Ulpian, tit. 16. § 1.

The law gave to a furviving husband or wife two years * to marry again, and a year and a half in case of a divorce. The fathers who would not suffer their children to marry, or refused to give their daughters a portion, were obliged to do it by the

magistrates +.

They were not allowed to betroth when the marriage was to be deferred for more than two years ; and as they could not marry a girl till she was twelve years old, they could not be betrothed to her till she was ten. The laws would not suffer them to trifle | to no purpose; and, under a pretence of being betrothed, to enjoy the privileges of married men.

It was contrary to law, for a man of fixty to § marry a woman of fifty. As they had given great privileges to married men, the law would not fuffer them to enter into useless marriages. For the same reason, the Calvisian senatusconsultum declared the marriage of a woman of above fifty, with a man lefs than fixty, to be 4 unequal: So that a woman of fifty years of age could not marry

* Fragm. of Ulpian, tit. 14. It feems the first Julian laws allowed three years: Speech of Augustus in Dio, lib. 56. Suetonius, life of Augustus, cap. 34. Other Julian laws granted but one year: The Papian law gave two. Fragm. of Ulpian, tit. 14. These laws were not agreeable to the people; Augustus therefore foftened or strengthened them, as they were more or less disposed to comply vith them.

† This was the 35th head of the Papian law. Leg.

19. ff. de ritu nuptiarum.

‡ See Dio, lib. 54. anno 736. Suetonius in Octavio, cap. 34.

Dio, lib. 54. and in the fame Dio, the speech

of Augustus, lib. 56.

Fragm. of Ulpian, tit. 16. and the 27th law, cod. de nuptiis.

+ Fragm. of Ulpian, tit. 16. § 3. VOL. II.

without incurring the penalties of these laws. Tiberius added * to the rigour of the Papian law, and prohibited men of fixty from marrying women under fifty; so that a man of fixty could not marry in any case whatsoever, without incurring the penalty. But Claudius abrogated † this law made under Tiberius.

All these regulations were more conformable to the climate of Italy, than to that of the North, where a man of sixty years of age has still a considerable degree of strength; and where women of

fifty are not always past child-bearing.

That they might not be unnecessarily limited in the choice they were to make, Augustus permitted all the free-born citizens who were not senators ‡, to marry freed-women ||. The Papian § law forbade the senators marrying freed-women, or those who had been brought up to the stage; and from the time of ‡ Ulpian, free-born persons were forbid to marry women who had led a disorderly life, who had played in the theatre, or who had been condemned by a public sentence. This must have been established by a decree of the senate. During the time of the republic they had never made laws like these, because the censors corrected this kind of disorders as soon as they arose, or else prevented their rising.

Constantine ++ made a law, in which he comprehended in the prohibition of the Papian law, not

* See Suetonius in Claudio, cap. 23.

† See Suctonius, life of Claudius, cap. 23. and the fragm. of Ulpian, tit. 16. § 3.

† Dio, 1. 54. fragm. of Ulpian, tit. 13. Augustus's speech in Dio, lib. 56.

§ Fragm. of Ulpian, cap. 13. and the 44th law ff. de ritu nuptiarum.

+ Fragm. of Ulpian, tit. 13, t 16. ++ See law 1. in cod. de natur. lib. only the senators, but even those who had a considerable rank in the state, without mentioning persons in an inferiour station: This constituted the law of those times. These marriages were therefore no longer forbidden, but to the free-born comprehended in the law of Constantine. Justinian * however abrogated the law of Constantine, and permitted all sorts of persons to contract these marriages: And by this means we have acquired so fatal a liberty.

It is evident, that the penalties inflicted on those who married contrary to the prohibition of the law, were the same as those inflicted on persons who did not marry. These marriages did not give them any civil advantage +; and the dowery ‡ was confiscat-

ed | after the death of the wife.

Augustus having adjudged the succession and legacies of those whom these laws had declared incapable to the public treasury &, they had the appearance rather of siscal, than of political and civil laws. The disgust they had already conceived at a burthen which appeared too heavy, was increased by their seeing themselves a continual prey to the avidity of the treasury. On this account, it became necessary under Tiberius, that \(\pm\$ these laws should be softened, that Nero should lessen the rewards given out of the treasury to the \((++\)) informers, that

* Novel. 177.

‡ Fragm. of Ulpian, tit. 16. § 2.

| See book xxvi. chap. 13.

§ Except in certain cases. See the fragm of Ulpian, tit 18. and the only law in cod. de caduc. tollend.

+ Relatum de moderanda Papia Poppæa. Tacit. annal. lib. iii. page 117.

+ He reduced them to the fourth part. Suetonius in Nerone, cap. 10.

[†] Law 37. ff. de operib. libertorum, § 7. fragm. of Ulpian, tit. 16. § 2.

Trajan should * put a stop to their plundering, that Severus + should also moderate these laws, and that the civilians should consider them as odious, and in all their decisions deviate from the literal

rigour.

Besides, the Emperours enervated ‡ these laws, by the privileges they gave, of the rights of husbands, of children, and of three children. They did more than this, they gave # particular persons a dispensation from the penalties of these laws. But regulations established for the public utility, seemed incapable of admitting an alleviation.

It was highly reasonable, that they should grant the rights of children to the Vestals &, whom religion retained in a necessary virginity: They gave in the same manner the privilege of 4 married men to soldiers, because they could not marry. It was customary to exempt the Emperours from the constraint of certain civil laws. Thus Augustus was

* See Pliny's panegyric.

† Severus extended even to twenty five years for the males, and to twenty for the females, the time fixed by the Papian law, as we fee by comparing the fragment of Ulpian, tit. 16. with what Tertullian fays, apol. cap. 4.

‡ P. Scipio, the cenfor, complains, in his speech to the people, of the abuses which were already introduced, that they received the same privileges for adopted as for natural children. aulus Gellius, lib. v.

сар. 19.

See the 31ft law de ritu nuptiarum.

§ Augustus, in the Papian law, gave them the privilege of mothers. See Dio, lib. 56. Numa had given them the ancient privilege of women who had three children, that is, of having no guardian. Plutarch, life of Numa.

4 This was granted them by Claudius, Dio, lib. 60.

freed from the constraint of the law which limited the power of * enfranchifing, and of that which fet bounds to the right of + bequeathing by testa-These were only particular cases: But at ment. last dispensations were given without discretion, and the rule itself became no more than an exception.

The fects of philosophers had already introduced in the empire a disposition that estranged them from bufiness; a disposition which could not gain ground in the time of the ‡ republic, when every body was employed in the arts of war and peace. From hence arose an idea of persection, as connected with a life of speculation; from hence an estrangement from the cares and embarraffinents of a family. The Christian religion coming after this philofophy, fixed, if I may make use of the expression, the ideas which that had only prepared.

Christianity stamped its character on jurisprudence; for empire has always a connection with the priesthood. This is visible from the Theodofian code, which is only a collection of the decrees

of the Christian emperours.

A panegyrist | of Constantine says to that Emperour, "Your laws were made only to correct " vice, and to regulate manners; you have strip-" ped the ancient laws of that artifice, which feem-" ed to have no other aim than to lay fnares for " fimplicity."

It is certain, that the alterations made by Conftantine took their rise, either from fentiments relating to the establishment of Christianity, or from ideas conceived of its perfection. From the first,

† Dio, lib. 55.

Nazarius in panegyrico Constantini, anno 321.

^{*} Leg. apud eum ff. de manumissionib. § 1.

See in Cicero's offices, his fentiments on this spirit of speculation.

proceeded those laws which gave such authority to bishops, and which have been the foundation of the ecclesiastical jurisdiction: From hence those laws which weakened paternal authority *, by depriving the father of his property in the possessions of his children. To extend a new religion, they were obliged to take away the dependence of children, who are always least attached to what is already established.

The laws made with a view to Christian perfection, were more particularly those by which the † penalties of the Papian laws were abolished; those who were not married, were equally exempted from them, with those who, being married, had no children.

"These laws were established, says an ecclesiastic thistorian, as if the multiplication of the human

" species was an effect of our care; instead of being fensible that the number is increased or dimi-

"nished, according to the order of providence."
Principles of religion have had an extraordinary
influence on the propagation of the human species.
Sometimes they have promoted it, as amongst the

Jews, the Mahometans, the Gauls, and the Chinese; at others, they have put a damp to it, as was the case of the Romans upon their conversion to Christianity.

They every where inceffantly preached up continency; a virtue the more perfect, because in its own nature it can be practised but by very few.

Constantine had not taken away the decimal laws, which granted a greater extent to the donations be-

+ Leg. unic. cod. Theod. de infirm. pan. calib. ct

orbit.

^{*} See law 1, 2, 3. in the Theodosian code, de bonis maternis maternique generis, etc. and the only law in the same code de bonis qua filiis samil. acquiruntur.

[±] Sozomenus, p. 27.

tween man and wife in proportion to the number of their children: Theodofius the younger * abro-

gated even these laws.

Justinian declared all those marriages + valid, which had been prohibited by the Papian laws. These laws required people to marry again: Justinian granted ‡ privileges to those who did not mar-

ry again.

By the ancient laws, the natural right which every one had to marry, and beget children, could not be taken away. Thus when they received a legacy on condition of not marrying, or when a patron made his § freed-man fwear, that he would neither marry nor beget children, the Papian law annulled both the 4 condition and the oath. clauses, on continuing in widowhood established amongst us, contradict the ancient law, and descend from the constitutions of the Emperours, founded on ideas of perfection.

There is no law that contains an express abrogation of the privileges and honours which the Romans had granted to marriages, and to a number of children. But where celibacy had the pre-eminence, marriage could not be held in honour; and fince they could oblige the officers of the public revenue to renounce fo many advantages by the abolition of the penalties, it is easy to perceive that with yet greater ease they might put a stop to the

rewards.

The fame spiritual reason which had permitted celibacy, foon imposed it even as necessary. forbid that I should here speak against celibacy, as

^{*} Leg. 2. et 3. cod. Theod. de jur. liber.

[†] Leg. Sancimus, code de nuptiis.

Novell. 127. cap. 3. Novell. 118. cap. 5.

Leg. 54. ff de condit. et demonst.

[§] Leg. 5. § 4. de jure patronatus. † Paul in his fentences, lib. iii. tit. 4, § 15.

adopted by religion: But who can be filent when this is built on libertinism; when the two sexes corrupting each other, even by the natural sensations themselves, sly from an union which ought to make them better, to live in that which always renders them worse?

It is a rule drawn from nature, that the more the number of marriages is diminished, the more corrupt are those who have entered into that state: The fewer married men, the less fidelity is there in marriage; as when there are more thieves, there are more thests.

CHAP. XXII.

Of the exposing of children.

THE Roman policy was very good in respect to the exposing of children. Romulus, says Dionysius Halicarnassus *, laid the citizens under an obligation to educate all their male children, and the eldest of their daughters. If the infants were deformed and monstrous, he permitted the exposing them, after having shewn them to sive of their nearest neighbours.

Romulus did not fuffer † them to kill any infant under three years old: By this means he reconciled the law which gave to fathers the right over their children of life and death, with that which

prohibited their being exposed.

We find also in Dionysius Halicarnassus ‡ that the law which obliged the citizens to marry, and to educate all their children, was in force in the 277th year of Rome: We see that custom had restrained

^{*} Antiquities of Rome, lib. 2.

⁺ Ibid.

[‡] Lib. 9.

while

the law of Romulus, which permitted them to ex-

pose their younger daughters.

We have no knowledge of what the law of the twelve tables (made in the year of Rome 301) appointed with respect to the exposing of children, except from a passage of Cicero*, who speaking of the office of tribune of the people, says, that soon after its birth, like the monstrous infant of the law of the twelve tables, it was stifled: The infant that was not monstrous was therefore preserved, and the law of the twelve tables made no alteration in the preceding institutions.

"The Germans, fays Tacitus †, never expose their children; amongst them the best manners have more force, than in other places the best laws." The Romans had therefore laws against this custom, and yet they did not follow them. We find not any ‡ Roman law, that permitted the exposing of children: This was, without doubt, an abuse introduced towards the decline of the republic, when luxury robbed them of their freedom, when wealth divided was called poverty, when the father believed that all was lost which was given to his family, and when this family was distinct from his property.

CHAP. XXIII.

Of the state of the universe after the destruction of the Romans.

THE regulations made by the Romans to increase the number of their citizens, had their effect,

† De morib. German.

^{*} Lib. 3. de legib.

[†] There is not any title on this subject in the Digest; the title of the code says nothing of it, no more than the Novels.

while the republic, in the full vigour of its constitution, had nothing to repair but the loffes they fustained by their courage, by their intrepidity, their firmness, their love of glory, and of virtue. But foon the wifest laws could not re-establish what a dying republic, what a general anarchy, what a military government, what a rigid empire, what a proud despotic power, what a feeble monarchy, what a ftupid, weak, and superstitious court had fucceffively pulled down. It might indeed be faid, that they conquered the world only to weaken it, and to deliver it up defenceless to bar-The Gothic nations, the Getes, the Sabarians. racens, and Tartars, by turns, harraffed them: Soon the barbarians had none to destroy but barbarians. Thus, in fabulous times, after the inundations and the deluge, there arose out of the earth armed men, who exterminated one another.

CHAP. XXIV.

The changes which happened in Europe, with regard to the number of the inhabitants.

IN the state Europe was in, one would not imagine it possible for it to be retrieved; especially when under Charlemagne it formed only one vast empire. But, by the nature of government at that time, it became divided into an infinite number of petty sovereignties; and as the lord or sovereign who resided in his village, or city, was neither great, rich, powerful, nor even safe, but by the number of his subjects; every one employed himfelf with a singular attention to make his little country slourish. This succeeded in such a manner, that notwithstanding the irregularities of government, the want of that knowledge which has since been acquired in commerce, and the numerous wars and disorders incessantly arising, most countries

tries of Europe were better peopled in those days,

than they are even at prefent.

I have not time to treat fully of this subject. But I shall cite the prodigious armies engaged in the crusades, composed of men of all countries. Puffendorf * says, that in the reign of Charles IX. there were in France twenty millions of men.

It is the perpetual reunion of many little states that has produced this diminution. Formerly every village of France was a capital; there is at present only one large one: Every part of the state was a centre of power; at present, all has a relation to one centre; and this centre is, in some measure, the state itself.

CHAP. XXV.

The same subject continued.

EUROPE, it is true, has, for these two ages past, greatly increased its navigation: This has both procured and deprived it of inhabitants. Holland sends every year a great number of mariners to the Indies; of whom not above two thirds return; the rest either perish or settle in the Indies. The same thing must happen to every other nation engaged in that trade.

We must not judge of Europe as of a particular state engaged alone in an extensive navigation. This state would increase in people, because all the neighbouring nations would endeavour to have a snare in this commerce; and mariners would arrive from all parts. Europe separated from the rest of the world by religion +, by vast seas, and deserts, cannot be repaired in this manner.

^{*} Introduction to the history of Europe, cap. 5. of France.

[†] Mahometan countries furround it almost on every fide.

CHAP. XXVI.

Consequences.

FROM all this we may conclude, that Europe is at present in a condition to require laws to be made in favour of the propagation of the human species. The politics of the ancient Greeks incessantly complain of the inconveniencies that attend a republic from the excessive number of citizens; but the politics of this age call upon us to take proper means to increase ours.

CHAP. XXVII.

Of the law made in France to encourage the propagation of the species.

LOUIS XIV. appointed * particular pensions to those who had ten children, and much larger to those who had twelve. But it is not sufficient to reward prodigies. In order to communicate a general spirit which leads to the propagation of the species, it is necessary for us to establish, like the Romans, general rewards, or general penalties.

CHAP. XXVIII.

By what means we may remedy a depopulation.

WHEN a state is depopulated by particular accidents, by wars, pestilence, or famine, there are still resources left. The men who remain may preserve the spirit of industry; they may seek to re-

^{*} The edict of 1666, in favour of marriages.

pair their misfortunes, and calamity itself may make them become more industrious. The evil is almost incurable, when the depopulation is prepared beforehand by interiour vice and a bad government. When this is the case, men perish with an insensible and habitual sickness: Born in misery and languishing weakness, in violence, or under the influence of a wicked administration, they see themselves destroyed, and frequently without perceiving the cause of their destruction. Of this we have a melancholy proof, in the countries desolated by despotic power, or by the excessive advantages of the clergy over the laity.

In vain shall we wait for the succour of children yet unborn, to re-establish a state thus depopulated. There is not time for this; men in their solitude are without courage or industry. With land sufficient to nourish a people, they have scarcely enough to nourish a family. The common people have not even a property in the miseries of the country, that is, in the fallows with which it abounds. The clergy, the prince, the cities, the great men, and some of the principal citizens, insensibly become proprietors of all the land, which lies uncultivated: The families who are ruined have left their sields; and the labouring man is de-

stitute.

In this fituation they should take the same meafures throughout the whole extent of the empire, which the Romans took in a part of theirs: They should practise in their distress, what these observed in the midst of plenty; that is, they should distribute land to all the families who are in want, and procure them the materials for clearing and cultivating it. This distribution ought to be continued as long as there is a man to receive it; and in such a manner, as not to lose a moment, that can be industriously employed.

CHAP. XXIX.

Of hospitals.

A Man is not poor because he has nothing, but because he does not work. The man who without any degree of wealth has an employmen, is as much at his ease as he who without labour has an income of an hundred crowns a-year. He who has no substance, and yet has a trade, is not poorer than he who possessing ten acres of land, is obliged to cultivate it for his subsistence. The mechanic who gives his art as an inheritance to his children, has left them a fortune which is multiplied in proportion to their number. It is not so with him, who having ten acres of land divides it amongst his children.

In trading countries, where many men have no other subsistence but from the arts, the state is frequently obliged to supply the necessities of the aged, the sick, and the orphan. A well regulated government draws this support from the arts themselves. It gives to some such employment as they are capable of performing; others are taught to work, and this teaching of itself becomes an em-

ployment.

Those alms which are given to a naked man in the streets, do not fulfill the obligations of the state, which owes to every citizen a certain subsistence, a proper nourishment, convenient cloathing, and a kind of life not incompatible with health.

Aurengzebe * being asked why he did not build hospitals, said, "I will make my empire so rich, "that there shall be no need of hospitals." He

ought

^{*} See Sir John Chardin's travels through Persia, vol. 8.

ought to have faid, I will begin by rendering my

empire rich, and then I will build hospitals.

The riches of a state suppose great industry. A-midst the numerous branches of trade, it is impossible but some must suffer; and consequently the mechanics must be in a momentary necessity.

Whenever this happens, the state is obliged to lend them a ready affistance; whether it be to prevent the sufferings of the people, or to avoid a rebellion. In this case hospitals, or some equivalent regulations, are necessary to prevent this misery.

But when the nation is poor, private poverty fprings from the general calamity; and is, if I may so express myself, the general calamity itself. All the hospitals in the world cannot cure this private poverty: On the contrary, the spirit of indolence which it constantly inspires, increases the general,

and confequently the private mifery.

Henry VIII. * resolving to reform the church of England, ruined the Monks, of themselves a lazy set of people that encouraged laziness in others: Because, as they practised hospitality, an infinite number of idle persons, gentlemen and citizens, spent their lives in running from convent to convent. He demolished even the hospitals in which the lower people found subsistence, as the gentlemen did theirs in the monasteries. Since these changes, the spirit of trade and industry has been established in England.

At Rome, the hospitals place every one at his case, except those who labour, except those who are industrious, except those who have land, ex-

cept those who are engaged in trade.

I have observed, that wealthy nations have need of hospitals, because fortune subjects them to a thousand accidents: But it is plain, that transient assistances are much better than perpetual foundations. The evil is momentary; it is necessary there-

^{*} See Burnet's hist of the reformation.

fore, that the fuccour should be of the same nature, and that it be applied to particular accidents.

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Of Laws as relative to Religion, considered in itself, and in its Doctrines.

CHAP. I.

Of religion in general.

A Samidst several degrees of darkness we may form a judgment of those which are the least thick, and among precipices, which are the least deep; so we may search among false religions for those that are most conformable to the welfare of society; for those, which, though they have not the effect of leading men to the felicity of another life, may contribute most to their happiness in this.

I shall examine therefore the several religions of the world in relation only to the good they produce in civil society; whether I speak of that which has its root in heaven, or of those which spring from the earth.

As in this work I am not a divine, but a political writer, I may here advance things which are no otherwise true, than as they correspond with a worldly manner of thinking, not as considered in their relation to truths of a more sublime nature.

A person of the least degree of impartiality must fee that I have never pretended to make the interests of religion submit to those of a political nature, but rather to unite them: Now, in order to unite, it is necessary that we should know them.

The

The Christian religion, which ordains that men should love each other, would without doubt have every nation blest with the best civil, the best political laws; because these, next to this religion, are the greatest good that men can give and receive.

CHAP. II.

A paradox of Mr. Bayle's.

MR. * Bayle has pretended to prove, that it is better to be an atheist than an idolater; that is, it is less dangerous to have no religion at all, than a bad one. " I had rather, faid he, it should be faid " of me, that I had no existence, than that I am a " villain." This is only a fophism, founded on this, that it is of no importance to the human race to believe that a certain man exists; whereas it is extremely useful for them to believe the existence of a God. From the idea of his non-existence, immediately follows that of our independence; or, if we cannot conceive this idea, that of disobedience. To fay that religion is not a restraining motive, because it does not always restrain, is equally absurd as to fay that the civil laws are not a restraining motive. It is a false way of reasoning against religion, to collect in a large work a long detail of the evils it has produced, if we do not give at the fame time an enumeration of the advantages which have flowed from it. Were I to relate all the evils that have arisen in the world from civil laws, from monarchy, and from republican government, I might tell of frightful things. Was it of no advantage for subjects to have religion, it would still be of some if princes had it, and if they whitened with foam the only rein which can restrain those who fear not

^{*} Thoughts on the comet. Vol. II. T

human laws. A prince who loves and fears religion, is a lion, who stoops to the hand that strokes, or to the voice that appeales him. He who fears and hates religion, is like the savage beast, that growls and bites the chain which prevents his slying on the passenger. He who has no religion at all, is that terrible animal who perceives his liberty only when he tears in pieces, and when he devours.

The question is not to know, whether it would be better that a certain man, or a certain people had no religion, than to abuse what they have; but to know which is the least evil, that religion be sometimes abused, or that there be no such restraint

as religion on mankind.

To diminish the horror of atheism, they lay too much to the charge of idolatry. It is far from being true, that when the ancients raised altars to a particular vice, they intended to shew that they loved the vice; this signified, on the contrary, that they hated it. When the Lacedæmonians erected a temple to Fear, it was not to shew that this war-like nation desired that he would in the midst of battle possess the hearts of the Lacedæmonians. They had deities to whom they prayed not to inspire them with guilt; and others whom they befought to shield them from it.

CHAP. III.

That a moderate government is most agreeable to the Christian religion, and a despotic government to the Mahometan.

THE Christian religion is a stranger to mere despotic power. The mildness so frequently recommended in the gospel, is incompatible with the despotic rage with which a prince punishes his subjects, and exercises himself in cruelty.

As

As this religion forbids the plurality of wives, its princes are less confined, less concealed from their subjects, and consequently have more humanity; they are more disposed to be directed by laws, and more capable of perceiving that they cannot do

whatever they pleafe.

While the Mahometan princes inceffantly give or receive death, the religion of the Christians renders their princes less timid, and consequently less cruel. The prince consides in his subjects, and the subjects in the prince. How admirable the religion, which, while it seems only to have in view the felicity of the other life, constitutes the happiness of this!

It is the Christian religion, that, in spite of the extent of the empire, and the influence of the climate, has hindered despotic power from being established in Æthiopia, and has carried into the heart of Africa the manners and laws of Europe.

The heir to the empire of Æthiopia enjoys a principality, and gives to other subjects an example of love and obedience. Nor far from thence may be seen the Mahometan shutting up the children of the king * of Sennar; at whose death the council sends to murder them, in favour of the prince who mounts the throne.

Let us fet before our eyes, on the one hand, the continual maffacres of the kings and generals of the Greeks and Romans; and on the other, the deftruction of people and cities by those famous conquerors Timur Beg and Jenghiz Khan, who ravaged Asia; and we shall see that we owe to Christianity, in government a certain political law, and in war a certain law of nations, benefits which human nature can never sufficiently acknowledge.

It is owing to this law of nations, that amongst

^{*} Description of Æthiopia by M. Ponce, a physician. Collection of edifying letters.

us victory leaves these great advantages to the conquered, life, liberty, laws, wealth, and always religion when the conqueror is not blind to his own interest.

We may truly fay, that the people of Europe are not at present more disunited than the people and the armies, or even the armies amongst themselves, were under the Roman empire, when it was become a despotic and military government. On the one hand, the armies engaged in war against each other; and, on the other, they pillaged the cities, and divided or consistated the lands.

CHAP. IV.

Consequences from the character of the Christian religion, and that of the Mahometan.

From the characters of the Christian and Mahometan religions we ought, without any further examination, to embrace the one, and reject the other: for it is much easier to prove that religion ought to humanize the manners of men, than that any particular religion is true.

It is a misfortune to human nature, when religion is given by a conqueror. The Mahometan religion, which speaks only by the sword, acts still upon men with that destructive spirit with which it

was founded.

The history of Sabaco + one of the pastoral kings of Egypt, is very extraordinary. The tutelar god of Thebes appearing to him in a dream, ordered him to put to death all the priests of Egypt. He judged that the gods were displeased at his being on the throne, since they ordered him to commit an action contrary to their ordinary pleasure; and therefore he retired into Æthiopia.

[†] See Diodorus, lib. 2.

CHAP. V.

That the Catholic religion is most agreeable to a monarchy, and the Protestant to a republic.

When a religion is introduced and fixed in a ftate, it is commonly fuch as is most suitable to the plan of government there established: for those who receive it, and those who are the cause of its being received, have scarcely any other idea of policy than that of the state in which they were born.

When the Christian religion, two centuries ago, became unhappily divided into Catholic and Protestant, the people of the north embraced the Protestant, and those of the south adhered still to the Catholic.

The reason is plain: the people of the north have, and will for ever have, a spirit of liberty and independence, which the people of the south have not; and therefore a religion which has no visible head, is more agreeable to the independency of the climate than that which has one.

In the countries themselves, where the Protestant religion became established, the revolutions were made pursuant to the several plans of political government. Luther having great princes on his side, would never have been able to make them relish an ecclesiastic authority that had no exterior pre-eminence; while Calvin, having to do with people who lived under republican governments, or with obscure citizens and monarchies, might very well avoid establishing dignities and pre-eminence.

Each of these two religions was believed to be the most perfect; the Calvinist judging his most con-

tormable

formable to what Christ had said, and the Lutheran to what the apostles had practised.

CHAP. VI.

Another of Mr. Bayle's paradoxes.

MR. Bayle, after having abused all religions, endeavours to sully Christianity: he boldly afferts, that true Christians cannot form a government of any duration. Why not? Citizens of this fort being infinitely enlightened with respect to the various duties of life, and having the warmest zeal to sulfil them, must be perfectly sensible of the rights of natural defence. The more they believe themselves indebted to religion, the more they would think due to their country. The principles of Christianity deeply engraved on the heart, would be infinitely more powerful than the false honour of monarchies, than the humane virtues of republics, or the service fear of despotic states.

It is aftonishing, that this great man should not be able to distinguish between the orders for the establishment of Christianity, and Christianity itsels; and that he should be liable to be charged with not knowing the spirit of his own religion. When the legislator, instead of laws, has given counsels, this is because he knew, that if these counsels were ordained as laws, they would be contrary to the spirit

of the laws themselves.

CHAP. VII.

Of the laws of perfection in religion.

HUman laws made to direct the will, ought to give precepts, and not counfels; religion made to influence the heart, ought to give many counfels, and few precepts.

When,

When, for instance, it gives rules not for what is good, but for what is better; not to direct to what is right, but to what is perfect; it is expedient, that these should be counsels, and not laws: for perfection can have no relation to the universality of men or things. Befides, if these were laws, there would be a necessity for an infinite number of others to make people observe the first. Celibacy was advised by Christianity: when they made it a law in respect to a certain order of men, it became necessary to make new * ones every day, in order to oblige those men to observe it. The legiflator wearied himfelf, and he wearied fociety, to make men execute by precept, what those who love perfection would have executed as counsel.

CHAP. VIII.

Of the connection between the moral laws and those of religion.

IN a country so unfortunate as to have a religion that God has not revealed, it is always necessary for it to be agreeable to morality; because even a false religion is the best security we can have of the

probity of men.

The principal points of religion of the inhabitants of Pegu + are, not to commit murder, not to steal, to avoid uncleanness, not to give the least uneasiness to their neighbour, but to do him, on the contrary, all the good in their power. With these rules they think they should be saved in any religion whatsoever. From hence it proceeds, that

* Dupin's ecclefiastical library of the fixth century, vol. v.

[†] Collection of voyages that contributed to the e-ftablishment of the East India company, vol. 3. part 1. page 63.

these people, though poor and proud, behave with gentleness and compassion to the unhappy.

CHAP. IX.

Of the Essenes.

THE Essenes * made a vow to observe justice to mankind, to do no ill to any person, upon whatsoever account; to keep faith with all the world, to hate injustice, to command with modesty, always to side with truth, and to sly from all unlawful gain.

CHAP. X.

Of the feet of Stoics.

THE several sects of Philosophy amongst the ancients, were a species of religion. Never were any principles more worthy of human nature, and more proper to form the good man, than those of the Stoics: and if I could for a moment cease to think that I am a Christian, I should not be able to hinder myself from ranking the destruction of the sect of Zeno among the missortunes that have befallen the human race.

It carried to excess only those things in which there is true greatness, the contempt of pleasure

and of pain.

It was this fect alone that made citizens; this alone that made great men; this alone great em-

perors.

Laying afide for a moment revealed truths, let us fearch through all nature, and we shall not find a nobler object than the Antoninus's: even Julian himself, Julian (a commendation thus wrested from me, will not render me an accomplice of his apo-

^{*} Hist, of the Jews by Prideaux.

stafy), no, there has not been a prince fince his

reign more worthy to govern mankind.

While the Stoics looked upon riches, human grandeur, grief, disquietudes, and pleasure, as vanity; they were entirely employed in labouring for the happiness of mankind, and in exercising the duties of society. It seems as if they regarded that sacred spirit, which they believed to dwell within them, as a kind of savourable providence watchful over the human race.

Born for fociety, they all believed that it was their destiny to labour for it; with so much the less fatigue, as their rewards were all within themselves. Happy by their philosophy alone, it seemed as if only the happiness of others could increase theirs.

CHAP. XI.

Of contemplation.

MEN being made to preserve, to nourish, to clothe themselves, and do all the actions of society, religion ought not to give them too con-

templative a life +.

The Mahometans become speculative by habit; they pray five times a-day, and each time they are obliged to cast behind them every thing which has any concern with this world; this forms them for speculation. Add to this that indifference for all things which is inspired by the doctrine of unalterable sate.

If other causes besides these concur to disengage their affections; for instance, if the severity of the government, if the laws concerning the proper-

[†] This is the inconvenience of the doctrine of Foe and Laokium.

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ty of land, give them a precarious spirit; all is lost.

The religion of the Gaurs formerly rendered Persia a slourishing kingdom; it corrected the bad effects of despotic power. The same empire is now destroyed by the Mahometan religion.

CHAP. XII.

Of penance.

PEnances ought to be joined with the idea of labour, not with that of idleness; with the idea of good, not with that of supereminent; with the idea of frugality, not with that of avarice.

CHAP: XIII.

Of inexpiable crimes.

IT appears from a passage of the books of the pontiss, quoted by Cicero *, that they had amongst the + Romans inexpiable crimes; and it is on this, that Zozimus founds the narration so proper to blacken the motives of Constantine's conversion; and Julian, that bitter raillery on this conversion in his Cæsars.

The Pagan religion indeed, which prohibited only fome of the groffer crimes, and which stopped the hand, but meddled not with the heart, might have crimes that were inexpiable: but a religion which bridles all the passions; which is not more jealous of actions than of thoughts and desires; which

* Lib 2. of laws.

+ Sacrum commissium, quod neque expiari poterit, impie commissium est; quod expiari poterit, publici facerdotes, expianto.

holds

holds us not by a few chains, but by an infinite number of threads; which, leaving human juffice aside, establishes another kind of justice; which is so ordered, as to lead us continually from repentance to love, and from love to repentance; which puts between the judge and the criminal a great mediator, between the just and the mediator a great judge; a religion like this ought not to have inexpiable crimes. But, while it gives fear and hope to all, it makes us fufficiently fenfible, that though there is no crime in its own nature inexpiable, yet a whole criminal life may be fo; that it is extremely dangerous to affront mercy, by new crimes and new expiations; that an uneafiness on account of ancient debts, from which we are never entirely free, ought to make us afraid of contracting new ones, of filling up the measure, and going even to that point where paternal goodness ends.

CHAP. XIV.

In what manner religion has an influence on civil laws.

As both religion and the civil laws ought to have a peculiar tendency to render men good citizens, it is evident that when one of these deviates from this end, the tendency of the other ought to be strengthened. The less severity there is in religion, the more there ought to be in the civil laws.

Thus the reigning religion of Japan having few doctrines, and proposing neither future rewards nor punishments, the laws, to supply these defects, have been made with the spirit of severity, and are executed with an extraordinary punctuality.

When the doctrine of necessity is established by religion, the penalties of the laws ought to be more severe, and the magistrate more vigilant; to the

U 2

end that men, who would otherwise become abandoned, might be determined by these motives: but it is quite otherwise, where religion has established

the doctrine of liberty.

From the inactivity of foul springs the Mahometan doctrine of predestination, and from this doctrine of predestination springs the inactivity of soul. This, they say, is in the decrees of God; they must therefore indulge their repose. In a case like this, the magistrate ought to awaken by the laws, those who are lulled assept preligion.

When religion condemns things which the civil laws ought to permit, there is danger left the civil laws, on the other hand, should permit what religion ought to condemn. Either of these is a constant proof of a want of true ideas of that harmony and proportion, which ought to subsist between

both.

Thus the Tartars * under Jengeiz-Khan, amongst whom it was a sin, and even a capital crime, to put a knife in the fire, to lean against a whip, to strike a horse with his bridle, to break one bone with another; did not believe it to be any sin to break their word, to seize upon another man's goods, to do an injury to a person, or to commit murder. In a word, laws which render that necessary which is only indifferent, have this inconveniency, that they make those things indifferent, which are absolutely necessary.

The people of Formosa + believe, that there is a kind of hell; but it is to punish those who at certain seasons have not gone naked; who have

* See the relation written by John Duplan Carpin, fent to Tartary, by Pope Innocent IV. in the year 1246.

† Collection of voyages that contributed to the establishment of the East-India company, vol. 5. page. 192.

dreffed

dressed in calico, and not in filk; who have prefumed to look for oysters; or who have undertaken any business without consulting the song of birds: while drunkenness and debauchery are not regarded as crimes. They believe, even that the debauches of their children are agreeable to their

gods.

When religion absolves the mind by a thing merely accidental, it loses its greatest influence on mankind. The people of India believe, that the waters of the Ganges have a sanctifying virtue *. Those who die on its banks are imagined to be exempted from the torments of the other life, and to be intitled to dwell in a region full of delights; and for this reason the ashes of the dead are sent from the most distant places to be thrown into this river. Little then does it signify whether they have lived virtuously or not, so they be but thrown into the Ganges.

The idea of a place of rewards has a necessary connection with the idea of the abodes of misery; and when they hope for the first without fearing the latter, the civil laws have no longer any influence. Men who believe that they are sure of the rewards of the other life, are above the power of the legislator; they look upon death with too much contempt: how shall the man be restrained by laws, who believes that the greatest pain the magistrate can inflict, will end in a moment to begin

his happiness?

^{*} Edifying letters, collect. 15.

CHAP. XV.

How false religions are sometimes corrected by the civil laws.

Simplicity, superstition or a respect for antiquity, have sometimes established mysteries or ceremonies shocking to modesty: of this the world has furnished numerous examples. Aristotle * says, that in this case the law permits the fathers of samilies to repair to the temple to celebrate these mysteries for their wives and children. How admirable the says law, which in spite of religion preserves the manners untainted!

Augustus † excluded the youth of either sex from affisting at any nocturnal ceremony, unless accompanied by a more aged relation; and when he revived the *Lupercalia*, he would not allow the young men to run naked.

CHAP. XVI.

How the laws of religion correct the inconveniencies of a political constitution.

ON the other hand, religion may support a state, when the laws themselves are incapable of doing it.

Thus when a kingdom is frequently agitated by civil wars, religion may do much by obliging one part of the state to remain always quiet. Among the Greeks, the Eleans, as priests of Apollo, enjoyed a perpetual peace. In Japan ‡, the city of

^{*} Polit. lib. 7. cap. 17.

⁺ Suetonius, in Augusto, cap. 31.

[‡] Collection of voyages made to establish an India company, vol. 4. pag. 127.

Meaco

Meaco enjoys a conftant peace, as being a holy city: religion supports this regulation, and that empire which seems to be alone upon earth, and which neither has nor will have any dependence on foreigners, has always in its own bosom a trade which war cannot ruin.

In kingdoms where wars are not entered upon by a general confent, and where the laws have not pointed out any means either of terminating or preventing them, religion establishes times of peace, or cessation of hostilities, that the people may be able to sow their corn, and perform those other labours which are absolutely necessary for the subsistence of the state.

Every year all hostility ceases between the * Arabian tribes for four months; the least disturbance would then be an impiety. In former times, when every lord in France declared war or peace, religion granted a truce, which was to take place at certain seasons.

C H A P. XVII.

The same subject continued.

When a state has many causes for hatred, religion ought to produce many ways of reconciliation. The Arabs, a people addicted to robbery, are frequently guilty of doing injury and injustice. Mahomet † enacted this law: "If any one forgives ‡ the blood of his brother, he may purfue the malefactor for damages and interest: but he who shall injure the wicked, after having received satisfaction, shall, in the day of judgment, fuffer the most grievous torments."

^{*} See Prideaux's life of Mahomet, page 64.

[†] Koran, book 1. chap. of the cow. † On renouncing the law of retaliation.

The Germans inherited the hatred and enmity of their near relations: but these were not eternal. Homicide was expiated by giving a certain number of cattle, and all the family received satisfaction: A thing extremely useful, says Tacitus +, because enmities are most dangerous amongst a free people. I believe indeed, that their ministers of religion who were held by them in so much credit, were concerned in these reconciliations.

Amongst the inhabitants of Malacca, * where no form of reconciliation it established, he who has committed murder, certain of being affassinated by the relations or friends of the deceased, abandons himself to fury, and wounds or kills all he meets.

CHAP. XVIII.

How the laws of religion have the effect of civil laws.

THE first Greeks were small nations, frequently dispersed, pirates at sea, unjust at land, without government and without laws. The mighty actions of Hercules and Theseus let us see the state of that rising people. What could religion do more than it did to inspire them with horrour against murder? It declared that the man who had been a murdered was enraged against the assassin, that he would possess his mind with terrour and trouble, and oblige him to yield to him the places he had frequented when alive. They could not touch the

+ De morib. Germanorum.

^{*} Collection of voyages that contributed to the e-stablishment of the East-India company, vol. 7. page 303. See also memoirs of the C. de Fourbin, and what he says of the people of Macassar.

[‡] Plato, of laws, lib. 9.

criminal, nor converse with him *, without being defiled: the murderer was to be expelled the city, and an expiation made for the crime +.

CHAP. XIX.

That it is not so much the truth or falsity of a doctrine which renders it useful or pernicious to men in civil government, as the use or abuse which is made of it.

THE most true and holy doctrines may be attended with the very worst consequences, when they are not connected with the principles of society; and, on the contrary, doctrines the most false may be attended with excellent consequences, when contrived so as to be connected with these principles.

The religion of Confucius * disowns the immortality of the soul; and the sect of Zeno did not believe it. These two sects have drawn from their bad principles consequences, not just indeed, but

* Tragedy of OEdipus Coloneus.

† Plato, of laws, lib. 9.

* A Chinese philosopher reasons thus against the doctrine of Foe. " It is faid in a book of that fect, " that the body is our dwelling place, and the foul " the immortal guest which lodges there: but if the " bodies of our relations are only a lodging, it is na-" tural to regard them with the same contempt we " should feel for a structure of earth and dirt. Is not " this endeavouring to tear from the heart the virtue " of love to one's own parents? This leads us even " to neglect the care of the body, and to refuse it the " compassion and affection so necessary for its prefer-" vation: hence the disciples of Foe kill themselves " by thousands." Work of an ancient Chinese philosopher in the collection of Du Halde, vol. 3. page 52. VOL. II. most admirable as to their influence on fociety. Those of the religion of Tao, and of Foe, believe the immortality of the soul; but from this sacred doctrine

they draw the most frightful consequences.

The doctrine of the immortality of the foul falsely understood, has, almost throughout the whole world, and in every age, engaged women, slaves, subjects, friends, to murder themselves, that they might go and serve in the other world the object of their respect or love in this. Thus it was in the West Indies; thus it was amongst the Danes +; thus it is at present in Japan *, in Macassar +, and

many other places.

These customs do not so directly proceed from the doctrine of the immortality of the soul, as from that of the resurrection of the body, from whence they have drawn this consequence, that after death the same individual will have the same wants, the same sentiments, the same passions. In this point of view the doctrine of the immortality of the soul has a prodigious effect on mankind; because the idea of only a simple change of habitation is more within the reach of the human understanding, and more adapted to flatter the heart, than the idea of a new modification.

It is not enough for religion to establish a doctrine, it must also direct its influence. This the Christian religion performs in the most admirable manner, particularly with regard to the doctrines of which we have been speaking. It makes us hope for a state which is the object of our belief; not for a state which we have already experienced, or known: thus every article, even the resurrection of the body, leads us to spiritual ideas.

+ See Tho. Bartholin's Ant. of the Danes.

^{*} An account of Japan, in the collection of voyages that contributed to establish an East-India company.

t Fourbin's memoirs.

CHAP. XX.

The same subject continued.

THE facred books * of the ancient Persians say, "If you would be holy, instruct your children, because all the good actions which they perform, will be imputed to you." They advise them to marry betimes, because children at the day of judgment will be as a bridge, over which those who have none cannot pass. These doctrines were false, but extremely useful.

CHAP. XXI.

Of the metempsychosis.

THE doctrine of the immortality of the foul is divided into three branches, that of pure immortality, that of a fimple change of habitation,
and that of a metempsychosis: that is the system of
the Christians, that of the Scythians, and that of
the Indians. We have just been speaking of the
two first; and I shall say of the last, that, as it has
been well or ill explained, it has had good or bad
effects. As it inspires men with a certain horrour
against bloodshed, very few murders are committed
in the Indies; and though they seldom punish with
death, yet they enjoy a perfect tranquillity.

On the other hand, women burn themselves at the death of their husbands; it is only the inno-

cent who fuffer a violent death.

Mr. Hyde.

CHAP. XXII.

That it is dangerous for religion to inspire an aversion for things in themselves indifferent.

A Kind of honour established in the Indies by the prejudices of religion, has made the several tribes conceive an aversion against each other. This honour is founded entirely on religion; these family-distinctions form no civil distinctions; there are Indians who would think themselves dishonoured by eating with their king.

These sorts of distinctions are connected with a certain aversion for other men, very different from those sentiments which ought to proceed from difference of rank; which amongst us comprehend a

love for inferiours.

The laws of religion should never inspire an aversion to any thing but vice, and above all they should never estrange man from a love and tender-

ness for his own species.

The Mahometan and Indian religions have in their bosom an infinite number of people: the Indians hate the Mahometans, because they eat cows: the Mahometans detest the Indians, because they eat hogs.

CHAP XXIII.

Of festivals.

When religion appoints a ceffation from labour, it ought to have a greater regard to the necessities of mankind, than to the grandeur of the being it designs to honour.

Athens + was subject to great inconveniencies

+ Xenophon on the republic of Athens.

from

from the excessive number of its festivals. These powerful people, to whose decision all the cities of Greece came to submit their quarrels, could not have time to dispatch such a multiplicity of affairs.

When Constantine ordained that the people should rest on the Sabbath, he made this decree for the cities *, and not for the inhabitants of the open country; he was sensible that labour in the

cities was useful, but in the fields necessary.

For the same reason, in a country supported by commerce, the number of sestivals ought to be relative to this very commerce. Protestant and Catholic countries are situated † in such a manner, that there is more need of labour in the former than in the latter; the suppression of festivals is therefore more suitable to Protestant than to Catholic countries.

Dampierre ‡ observes, that the diversions of different nations vary greatly according to the climate. As hot climates produce a quantity of delicate fruits, the barbarians easily find necessaries, and therefore spend much time in diversions. The Indians of colder countries have not so much leisure, being obliged to sish and hunt continually; hence they have less music, dancing, and sestivals. If a new religion should be established amongst these people, it ought to have regard to this in the institution of sestivals.

† The Catholics lie more towards the fouth, and the Protestants towards the north.

^{*} Leg. 3. code de feriis. This law was doubtless made only for the Pagans.

[‡] Dampierre's voyages, vol. 2.

CHAP. XXIV.

Of the local laws of religion.

THERE are many local laws in various religions; and when Montezuma with fo much obstinacy insisted that the religion of the Spaniards was good for their country, and his for Mexico, he did not affert an absurdity; because, in fact, ligiflators could never help having a regard to what nature had established before them.

The opinion of the metempsychosis is adapted to the climate of the Indies. An excessive heat burns up all the * country; they can breed but very sew cattle; they are always in danger of wanting them for tillage; their black cattle multiply but indifferently +; and they are subject to many distempers: A law of religion which preserves them, is therefore most suitable to the policy of the country.

While the meadows are scorched up, rice and pulse, by the affistance of water, are brought to perfection: A law of religion which permits only this kind of nourishment, must therefore be extremely

useful to men in these climates.

The flesh ‡ of cattle in that country is insipid, but the milk and butter which they receive from them serves for a part of their subsistence: Therefore the law which prohibits the eating and killing of cows, is in the Indies not unreasonable.

Athens contained a prodigious multitude of people, but its territory was barren. It was therefore a religious maxim with this people, that those who offered some small presents to the gods ||, honoured them more than those who sacrificed an ox.

- * See Bernier's travels. vol. 2. page 137.
- + Edifying letters, collect. xii. p. 95.
- ‡ Bernier's travels, vol. 2. p. 187. Euripides in Athenæus, lib. 2.

CHAP. XXV.

The inconveniency of transplanting a religion from one country to another.

IT follows from hence, that there are frequently many inconveniencies attending the transplant-

ing a religion from one country to another.

"The hog, fays Mr. Boulainvilliers *, must be very scarce in Arabia, where there are almost no woods, and hardly any thing sit for the nourishment of these animals: Besides, the saltness of the water and food renders the people most sufficient ceptible of cutaneous disorders." This local law could not be good in other + countries, where the hog is almost an universal, and in some fort, a netessary nourishment.

I shall here make a reflection. Sanctorius has observed that pork transpires but little ‡, and that this kind of meat greatly hinders the transpiration of other food; he has found that this diminution amounts to a third ||. Besides, it is known, that the want of transpiration forms or increases the disorders of the skin. The feeding on pork ought therefore to be prohibited, in climates where the people are subject to these disorders, as in Palestine,

Arabia, Egypt, and Lybia.

CHAP. XXVI.

The same subject continued.

SIR John Chardin & fays, that there is not a navigable river in Persia, except the Kur, which

Medicina Statica, § iii. aphor. 23.

^{*} Life of Mahomet. + As in China.

is at the extremity of the empire. The ancient law of the Gaurs, which prohibited failing on rivers, was not therefore attended with any inconvenience in this country, though it would have ruined the trade of another.

Frequent bathings are extremely useful in hot climates. On this account they are ordained in the Mahometan law, and in the Indian religion. In the Indies it is a most meritorious act to pray to * God in the running stream: But how could these

things be performed in other climates?

When a religion adapted to the climate of one country clashes too much with the climate of another, it cannot be there established; and whenever it has been introduced, it has been afterwards discarded. It seems to all human appearance, as if the climate had prescribed the bounds of the Chri-

stian and Mahometan religions.

It follows from hence, that it is almost always proper for a religion to have particular doctrines, and a general worship. In laws concerning the practice of religious worship, there ought to be but few particulars: For instance, they should command mortification in general, and not a certain kind of mortification: Christianity is full of good sense: Abstinence is of divine institution; but a particular kind of abstinence is ordained by human authority, and therefore may be changed.

^{*} Bernier's travels, vol. 2.



BOOK XXV.

Of Laws as relative to the Establishment of Religion and its external Polity.

CHAP. I.

Of religious sentiments.

THE pious man and the atheist always talk of religion; the one speaks of what he loves, and the other of what he fears.

CHAP. II.

Of the motives of attachment to different religions.

THE different religions of the world do not give to those who profess them equal motives of attachment; this depends greatly on the manner in which they agree with the turn of thought and

perceptions of mankind.

We are extremely addicted to idolatry, and yet have no great inclination for the religion of idolaters: We are not very fond of spiritual ideas, and yet are most attached to those religions which teach us to adore a spiritual being. This proceeds from the satisfaction we find in ourselves at having been so intelligent as to chuse a religion, which raises the Deity from that baseness in which he had been placed by others. We look upon idolatry as the religion of an ignorant people; and the religion which has a spiritual being for its object, as that of the most enlightened nations.

When with a doctrine that gives us the idea of a spiritual supreme being, we can still join those of a sensible nature, and admit them into our wor-

Vol. II. Y ship,

ship, we contract a greater attachment to religion; because those motives which we have just mentioned, are added to our natural inclination for the objects of sense. Thus the Catholics, who have more of this kind of worship than the Protestants, are more attached to their * religion, than the Protestants are to theirs.

When the † people of Ephefus were informed that the fathers of the council had declared they might call the Virgin Mary the mother of God, they were transported with joy, they kissed the hands of the bishops, they embraced their knees, and the

whole city refounded with acclamations.

When an intellectual religion superadds the idea of a choice made by the Deity, and a preference of those who profess it to those who do not, this greatly attaches us to religion. The Mahometans would not be such good Mussulmans, if on the one hand there were not idolatrous nations who make them imagine themselves the champions of the unity of God; and on the other hand Christians, to make them believe that they are the objects of his preference.

A religion burthened with many ‡ ceremonies, attaches us to it more strongly than that which has

a fewer number.

We have an extreme propensity to things in which we are continually employed: Witness the obstinate prejudices of the || Mahometans and the Jews;

* They are more zealous for its propagation.

+ St. Cyril's letter.

† This does not contradict what I have faid in the last chapter of the preceding book: I here speak of the motives of attachment to religion, and there of the means of rendering it more general.

| This has been remarked over all the world. See as to the Turks, the missions of the Levant; the col-

lection

Jews; and the readiness with which barbarous and savage nations change their religion, who, as they are employed entirely in hunting, or war, have but

few religious ceremonies.

Men are extremely inclined to the passions of hope and fear; a religion, therefore, that had neither a heaven nor a hell, could hardly please them. This is proved by the ease with which foreign religions have been established in Japan, and the zeal and fondness with which they were received *.

In order to raise an attachment to religion, it is necessary that it should inculcate pure morals. Men who are knaves by retail, are extremely honest in the gross; they love morality. And were I not treating of so grave a subject, I should say that this appears remarkably evident in our theatres; we are sure of pleasing the people by sentiments avowed by morality; we are sure of shocking them by those it disapproves.

When external worship is attended with great magnificence, it flatters ours minds, and strongly attaches us to religion. The riches of temples, and those of the clergy greatly affect us. Thus even the misery of the people, is a motive that renders them fond of a religion, which has served as a pretext to those who were the cause of their mise-

ry.

lection of voyages that contributed to the establishment of an East-India company, vol. 3. p. 201. on the Moors of Batavia; and Father Labat on the Mahometan negroes, &c.

* The Christian and Indian religions; these have a hell and a paradise, which the religion of Sintos

has not.

CHAP. III.

Of temples.

A LMOST all civilized nations dwell in houses; from hence naturally arose the idea of building a house for God, in which they might adore and seek him amidst all their hopes and sears.

In fact, nothing is more comfortable to mankind, than a place in which they may find the Deity peculiarly prefent, and where they may affemble together to confess their weakness and tell their griefs.

But this natural idea never occurred to any but fuch as cultivated the land; those who had no houses for themselves, were never known to build

temples.

This was the cause that made Jenghiz-Khan discover such a prodigious contempt for mosques *. This prince + examined the Mahometans; he approved of all their doctrines, except that of the necessity of going to Mecca: He could not comprehend why God might not every where be adored. As the Tartars did not dwell in houses, they could have no idea of temples.

Those people who have no temples, have but a small attachment to their own religion. This is the reason why the Tartars have in all times given so great a toleration ‡; why the barbarous nations

+ Ibid. p. 342.

^{*} Entering the mosque of Bochara, he took the Koran, and threw it under his horse's feet. Hist. of the Tartars, p. 173.

[†] This disposition of mind has been communicated to the Japanese, who, as is easily proved, derive their original from the Tartars.

who conquered the Roman empire, did not hefitate a moment to embrace Christianity; why the favages of America have so little fondness for their own religion; why, since our missionaries have built churches in Paraguay, the natives of that country are become so zealous for ours.

As the Deity is the refuge of the unhappy, and none are more unhappy than criminals, men have been naturally led to think temples an afylum for those wretches. This idea appeared still more natural to the Greeks, where murderers, chased from their city and the presence of men, seemed to have no houses but the temples, nor other protectors but the gods.

At first these were only designed for involuntary homicides; but when the people made them a sanctuary for great criminals, they fell into a gross contradiction. If they had offended men, they had much greater reason to believe they had of-

fended the gods.

These asylums multiplied in Greece. The temples, says Tacitus*, were silled with insolvent debtors, and wicked slaves; the magistrate found it difficult to exercise his office; the people protected the crimes of men as the ceremonies of the gods; at length the senate was obliged to retrench a great number of them.

The laws of Moses were perfectly wise. The man who involuntarily killed another, was innocent; but he was obliged to be taken away from before the eyes of the relations of the deceased: Moses therefore appointed an asylum + for such unfortunate people. Great criminals deserved not a place of safety, and they had none ‡; the Jews had only a portable tabernacle, which continually changed its place: This excluded the idea of a sanctuary. It is true that they had afterwards a

^{*} Annal. lib. 2. † Numb. xxxv. ‡ Ibid. temple;

temple; but the criminals who would refort thither from all parts, might difturb the divine fervice. If perfons who had committed manflaughter, had been driven out of the country, as was customary among the Greeks, they had reason to fear that they would worship strange gods. All these considerations made them establish cities of refuge, where they might stay till the death of the high-priest.

CHAP. IV.

Of the ministers of religion.

THE first men, says Porphyry, sacrificed only vegetables. In a worship so simple, every one

might be priest in his own family.

The natural defire of pleafing the Deity multiplied ceremonies. From hence it followed, that men employed in agriculture became incapable of observing them all, and of filling up the number.

Particular places were confectated to the Gods; it then became necessary that they should have ministers to take care of them; in the same manner as every citizen took care of his house and domestic affairs. Hence, the people who have no priests, are commonly barbarians: Such were formerly the Pedalians *, and such are still the Wolgusky †.

Men confecrated to the Deity ought to be honoured, especially amongst people who have formed an idea of a personal purity necessary to approach the places most agreeable to the gods, and for the performance of particular ceremonies.

* Lislus Giraldus, p. 726.

[†] A people of Siberia. See the account given by Mr. Everard Ysbrant-Ides, in the collection of travels to the North, vol. 8.

The worship of the gods requiring a continual application, most nations were led to consider the clergy as a separate body. Thus, amongst the Egyptians, the Jews, and the Persians *, they confectated to the Deity certain families who performed and perpetuated the service. There have even been religions, which have not only estranged ecclesiastics from business, but have also taken away the embarrassments of a family; and this is the practice of the principal branch of Christianity.

I shall not here treat of the consequences of the law of celibacy: It is evident, that it may become hurtful, in proportion as the body of the clergy may be too numerous; and, in consequence of

this, that of the laity too small.

By the nature of the human understanding, we love in religion every thing which carries the idea of difficulty; as in point of morality we have a speculative fondness for every thing which bears the character of feverity. Celibacy has been most agreeable to those nations to whom it seemed least adapted, and with whom it might be attended with the most fatal consequences. In the southern countries of Europe, where, by the nature of the climate, the law of celibacy is more difficult to obferve, it has been retained; in those of the North, where the passions are less lively, it has been banished. Further, in countries where there are but few inhabitants, it has been admitted; in those that are vastly populous, it has been rejected. is obvious, that these reflections relate only to the too great extension of celibacy, and not to celibacy itfelf.

^{*} Şee Mr. Hyde.

CHAP. V.

Of the bounds which the laws ought to prescribe to the riches of the clergy.

A S particular families may be extinct, their wealth cannot be a perpetual inheritance. The clergy is a family which cannot be extinct; wealth is therefore fixed to it for ever, and cannot go out of it.

Particular families may increase; it is necessary then that their wealth should also increase. The clergy is a family which ought not to increase;

their wealth ought then to be limited.

We have retained the regulations of the Levitical laws as to the possessions of the clergy, except those relating to the bounds of these possessions: Indeed, amongst us we must ever be ignorant of the bounds, beyond which any religious community can no longer be permitted to acquire.

These endless acquisitions appear to the people so unreasonable, that he who should speak in their

defence, would be regarded as an idiot.

The civil laws find fometimes many difficulties in altering established abuses; because they are connected with things worthy of respect: In this case an indirect proceeding would be a greater proof of the wisdom of the legislator, than another which struck directly at the thing itself. Instead of prohibiting the acquisitions of the clergy, we should seek to give them a distate for them; to leave them the right, and to take away the sact.

In some countries of Europe, a respect for the privileges of the nobility has established in their favour a right of indemnity over immoveable goods acquired in mortmain. The interest of the prince has in the same case made him exact a right of a

mortization.

mortization. In Castille, where there is no such right, the clergy have seized upon every thing. In Arragon, where there is some right of amortization, they have obtained less: In France, where this right and that of indemnity are established, they have acquired less still; and it may be said, that the prosperity of this kingdom is in a great measure owing to the exercise of these two rights. If possible then, increase these rights, and put a stop to the mortmain.

Render the ancient and necessary patrimony of the clergy facred and inviolable; let it be fixed and eternal like that body itself: But let new inheri-

tances be out of their power.

Permit them to break the rule, when the rule is become an abuse; suffer the abuse, when it enters into the rule.

They still remember at Rome a certain memorial sent thither on some disputes with the clergy, in which was this maxim: "The clergy ought to "contribute to the expences of the state, let the "Old Testament say what it will." They concluded from this passage, that the author of this memorial was better versed in the language of the tax-gatherers, than in that of religion.

CHAP. VI.

Of monasteries.

THE least degree of common sense will let us see that bodies designed for a perpetual continuance should not be allowed to sell their sunds for life, nor to borrow for life; unless we want them to be heirs to all those who have no relations, and to those who do not chuse to have any. These men play against the people, but they hold the bank themselves.

Vol. II.

CHAP. VII.

Of the luxury of superstition.

"THOSE are guilty of impiety towards the gods, fays Plato *, who deny their existence; or who, while they believe it, maintain that they

" do not interfere with what is done here below;
or, in fine, who think that they can eafily appeafe them by facrifices: Three opinions equal-

" ly pernicious." Plato has here faid all that the clearest light of nature has ever been able to fay, in

point of religion.

The magnificence of external worship has a principle connection with the constitution of the state. In good republics, they have curbed not only the luxury of vanity, but even that of superstition. They have introduced frugal laws into religion. Of this number are many of the laws of Solon, many of those of Plato on sunerals adopted by Cicero; and in fine, some of the laws of Numa + on sacrifices.

Birds, fays Cicero, and paintings begun and finished in a day, are gifts the most divine. We offer common things, says a Spartan, that we may always have it in our power to honour the gods.

The desire of man to pay his worship to the Deity, is very different from the magnificence of this worship. Let us not offer our treasures to him, if we are not proud of shewing that we esteem what he would have us despise.

"What must the gods think of the gifts of the impious," said the admirable Plato, "when a

" good man would blush to receive presents from

" a villain?"

* On laws, lib. 10.

Religion

⁺ Rogum vino ne respergito. Law of the twelve tables.

Religion ought not, under the pretence of gifts, to draw from the people, what the necessities of state have left them; but, as Plato * fays, "The chaste and the pious ought to offer gifts, which resemble themselves."

Nor is it proper for religion to encourage expenfive funerals. What is there more natural, than to take away the difference of fortune in a circumflance, and in the very moment, which equals all fortunes?

CHAP. VIII.

Of the pontificate.

WHEN religion has many ministers, it is natural for them to have a chief, and for a fovereign pontiff to be established. In monarchies, where the feveral orders of the state cannot be kept too diftinct, and where all powers ought not to be lodged in the fame person; it is proper that the pontificate be diffinet from the empire. The fame necessity is not to be met with in a despotic government, the nature of which is to unite all the different powers in the same person. But in this case it may happen, that the prince may regard religion as he does the laws themselves, as dependent on his own will. To prevent this inconvenience, there ought to be monuments of religion, for instance, facred books, which fix and establish it. king of Persia is the chief of the religion; but this religion is regulated by the Koran. Emperour of China is the fovereign pontiff: But there are books in the hands of every body, to which he himself must conform. In vain a certain Emperour attempted to abolish them; they triumphed over tyranny.

^{*} On laws, lib. 2.

CHAP. IX.

Of toleration in point of religion.

WE are here politicians, and not divines: But the divines themselves must allow that there is a great difference between tolerating and appro-

ving a religion.

When the legislator has believed it a duty to permit the exercise of many religions, it is necessary that he should ensorce also a toleration amongst these religions themselves. It is a principle, that every religion which is persecuted, becomes itself persecuting: For as soon as by some accidental turn it arises from persecution, it attacks the religion which persecuted it; not as a religion, but as a tyranny.

It is necessary then that the laws require from the feveral religions, not only that they shall not embroil the state, but that they shall not raise disturbances amongst themselves. A citizen does not fulfil the laws, by not disturbing the government; it is requisite, that he should not trouble any citi-

zen whomfoever.

CHAP. X.

The fame fubjest continued.

As there are scarce any but persecuting religions that have an extraordinary zeal for being established in other places, because a religion that can tolerate others, seldom thinks of its own propagation: It must therefore be a very good civil law, when the state is already satisfied with the established religion, not to suffer the establishment of another.

This

This is then a fundamental principle of the political laws in regard to religion: That when the state is at liberty to receive or to reject a new religion, it ought to be rejected; when it is received, it ought to be tolerated.

CHAP. XI.

Of changing a religion.

A Prince who undertakes to destroy or change the established religion of his kingdom, must greatly expose himself. If his government is despotic, he runs a much greater risk of seeing a revolution arise from such a proceeding, than from any tyranny whatsoever, and a revolution is not an uncommon thing in such states. The reason of this is, because a state cannot change its religion, manners, and customs in an instant, and with the same rapidity as the prince publishes the ordinance which establishes a new religion.

Besides, the ancient religion is connected with the constitution of the kingdom, and the new one is not; the former agrees with the climate, and very often the new one is opposite to it. Moreover, the citizens, disgusted with their laws, look upon the government already established with contempt; they conceive a jealousy against the two religions, instead of a firm belief in one; and, in a word, those innovations give the state, at least for some time, both bad citizens and bad believers.

CHAP. XII.

Of penal laws.

PENAL laws ought to be avoided, in respect to religion: They imprint fear, it is true; but as religion religion has also penal laws which inspire fear, the one is effaced by the other; and between these two different kinds of fear, the mind becomes hardened.

The threatnings of religion are so terrible, and its promises so great, that when they actuate the mind, whatever efforts the magistrate may use to oblige us to renounce it, he seems to leave us nothing when he deprives us of the exercise of our religion, and to bereave us of nothing, when we

are freely allowed to profess it.

It is not therefore by filling the foul with the idea of this great object, by haftening her approach to that critical moment in which it ought to be of the highest importance, that she can be most effectually detached from any particular religion: A more certain way is to tempt her by favours, by the conveniencies of life, by the hopes of fortune: Not by that which warns her of danger, but by that which makes her forget it; not by that which shocks her, but by that which throws her into indifference, at the time when other passions actuate the mind, and those which the religion inspires are hushed into silence. A general rule in changing a religion; the invitations should be much stronger than the penalties.

The temper of the human mind has appeared even in the nature of the punishments they have employed. If we take a survey of the persecutions in Japan *, we shall find that they were more thocked at cruel torments, than at long sufferings, which rather weary than affright, which are the more difficult to surmount from their appearing

less difficult.

In a word, history sufficiently informs us, that penal laws have never had any other effect but to destroy.

* In the collection of voyages that contributed to the establishment of an East-India company, vol. 5. CHAP.

CHAP. XIII.

A most humble remonstrance to the inquisitors of Spain and Portugal.

A Jewess of eighteen years of age, who was burnt at Lisbon at the last Auto-da-fé, gave occasion to the following little piece; the most idle, I believe, that ever was wrote. When we attempt to prove things so evident, we are sure never to convince.

The author declares, that though a Jew, he has a respect for the Christian religion; and that he should be glad to take away from the princes who are not Christians, a plausible pretence for perse-

cuting this religion.

"You complain," fays he to the inquisitors, that the Emperour of Japan caused all the Christians in his dominions to be burnt by a slow fire. But he will answer, We treat you who do not believe like us, as you yourselves treat those who do not believe like you: You can only complain of your weakness, which has hindered you from exterminating us, and which has enabled us to exterminate you.

"But it must be confessed that you are much more cruel than this Emperour. You put us to death, who believe only what you believe, because we do not believe all that you believe. "We follow a religion which you yourselves know to have been formerly dear to God. We think that God loves it still, and you think that he

"loves it no more: And because you judge thus,
"you make those suffer by sword and fire, who

" hold an errour fo pardonable as to believe that

" God * still loves what he once loved.

"If you are cruel to us, you are much more fo to our children; you cause them to be burnt,

" because they follow the inspirations given them

"by those whom the law of nature, and the laws of all nations teach them to regard as God's.

"You deprive yourselves of the advantage you

" have over the Mahometans, with respect to the manner in which their religion was established.

"When they boast of the number of their belie-

" vers, you tell them that they have obtained them by violence, and that they have extended their

" religion by the fword: Why then do you esta-

" blish yours by fire?

"When you would bring us over to you, we object a fource from which you glory to de-

" fcend. You reply to us, that though your religion is new, it is divine; and you prove it

from its growing amidst the persecution of Pa-

" gans, and when watered by the blood of your martyrs: But at present you play the part of the

" Dioclesians, and make us take yours.

"We conjure you, not by the mighty God whom both you and we ferve, but by that Christ

" who, you tell us, took upon him a human form,

to propose himself for an example for you to

" follow; we conjure you to behave to us, as he himself would behave, was he upon earth. You

" would have us be Christians, and you will not

" be fo yourselves.

"But if you will not be Christians, be at least men: Treat us as you would, if having only the

" weak light of justice which nature bestows, you

* The fource of the blindness of the Jews is, their not perceiving that the economy of the gospel is in the order of the designs of God; and that it is in this light a consequence of his immutability itself.

" had not a religion to conduct, and a revelation

" to enlighten you.

" If Heaven has had fo great a love for you, as " to make you fee the truth, you have received a " great favour: But is it for children who have " received the inheritance of their father, to hate " those who have not?

" If you have this truth, hide it not from us by " the manner in which you propose it. The cha-" racteriftic of truth is its triumph over hearts and " minds, and not that impotency which you con-" fels, when you would force us to receive it by

" tortures.

" If you were wife, you would not put us to " death for no other reason, but because we are " unwilling to deceive you. If your Christ is the "Son of God, we hope he will reward us for be-" ing fo unwilling to profane his mysteries; and " we believe, that the God whom both you and " we ferve, will not punish us for having suffered " death for a religion which he formerly gave us, " only because we believe that he still continues to " give it.

"You live in an age in which the light of nature " shines more bright than it has ever done; in " which philosophy has enlightened human under-" standings; in which the morality of your gospel " has been more known; in which the respective " rights of mankind, with regard to each other, " and the empire which one conscience has over " another, are best understood. If you do not "therefore shake off your ancient prejudices, " which, whilst unregarded, mingle with your " passions, it must be confessed, that you are in-" corrigible, incapable of any degree of light or "instruction; and a nation must be very unhap-" py that gives authority to fuch men.

"Would you have us frankly tell you our " thoughts? You consider us rather as your ene-VOL. II.

- " mies, than as the enemies of your religion: For if you loved your religion, you would not fuf-
- " fer it to be corrupted by fuch gross igno-

" rance.

- "It is necessary that we should advertise you of one thing, that is, if any one in times to come shall dare to affert, that in the age in which we
- " live the people of Europe were civilized, you
- " will be cited to prove that they were barbarians;
- " and the idea they will have of you, will be fuch as will dishonour your age, and spread

" hatred over all your contemporaries."

CHAP. XIV.

Why the Christian religion is so odious in Japan.

WE have already mentioned * the perverse temper of the people of Japan. The magistrates considered the sirmness which Christianity inspires, when they attempted to make the people renounce their faith, as in itself most dangerous: They fancied that it increased their obstinacy. The law of Japan punishes severely the least disobedience. They ordered them to renounce the Christian religion: They did not renounce it, this was disobedience: They punished this crime; and the continuance in disobedience seemed to deserve another punishment.

Punishments among the Japanese are considered as the revenge of an insult done to the Prince. The songs of triumph sung by our martyrs appeared as an outrage against him; the title of martyr provoked the magistrates; in their opinion it signified rebel: They did all in their power to prevent their obtaining it. It was then that their minds

^{*} Book vi. chap. 24.

were exasperated, and a horrid struggle was seen between the tribunals that condemned, and the accused who suffered; between the civil laws, and those of religion.

CHAP. XV.

Of the propagation of religion.

ALL the people of the East, except the Mahometans, believe all religions in themselves indifferent. They fear the establishment of another religion, no otherwise than as a change in government. Amongst the Japanese, where there are many sects, and where the state has had for so long a time an ecclesiastic superior, they * never dispute on religion. It is the same with the people of Siam †. The Calmucs ‡ do more, they make it a point of conscience to tolerate every species of religion: At Calicut || it is a maxim of the state,

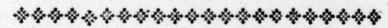
that every religion is good.

But it does not follow from hence, that a religion brought from a far distant country, and quite disferent in climate, laws, manners, and customs, will have all the success to which its holiness might intitle it. This is more particularly true in great despotic empires: Here strangers are tolerated at first, because there is no attention given to what does not seem to strike at the authority of the Prince. As they are extremely ignorant, an European may render himself agreeable, by the knowledge he communicates; this is very well in the beginning. But as soon as he has any success, when disputes arise, and when men who have some interest become informed of it; as their empire by its

^{*} See Kempfer. + Fourbin's memoirs.

t Hist. of the Tartars, part 5.
Pirard's travels, chap. 27.

very nature above all things requires tranquillity, and as the least disturbance may overturn it, they proscribe the new religion, and those who preach it: Disputes between the preachers breaking out, they begin to entertain a distaste for a religion, on which even those who propose it are not agreed.



BOOK XXVI.

Of Laws as relative to the Order of Things on which they determine.

CHAP. I.

Idea of this book.

MEN are governed by feveral kinds of laws; by the law of nature; by the divine law, which is that of religion; by ecclefiaftical, otherwife called canon law, which is that of religious polity; by the law of nations, which may be confidered as the civil law of the universe, in which sense every nation is a citizen; by the general political law, whose object is that human wisdom which has been the foundation of all focieties; by the particular political law, which relates to each fociety; by the law of conquest founded on this, that one nation has been willing and able, or has had a right to offer violence to another'; by the civil law of every fociety, by which a citizen may defend his pofferfions and his life, against the attacks of any other citizen; in fine, by domestic law, which proceeds from a fociety's being divided into feveral families, all which have need of a particular government.

There are therefore different orders of laws, and the fublimity of human reason consists in perfectly knowing to which of these orders the things that are to be determined ought to have a principal re-

lation,

lation, and not to throw into confusion these principles which should govern mankind.

CHAP. II.

Of laws divine and human.

WE ought not to decide by divine laws, what should be decided by human laws; nor determine by human, what should be determined by divine laws.

These two forts of laws differ in their original

in their object, and in their nature.

It is univerfally acknowledged, that human laws are in their own nature different from those of religion; this is an important principle: but this principle is itself subject to others, which must be

inquired after.

1. It is in the nature of human laws to be subject to all the accidents which can happen, and to vary in proportion as the will of man changes: on the contrary, by the nature of the laws of religion, they are never to vary. Human laws appoint for some good; those of religion for the best: good may have another object, because there are many kinds of good: but the best is but one, it cannot therefore change. We may change laws, because they are reputed no more than good; but the institutions of religion are always supposed to be the best.

2. There are kingdoms, in which the laws are of no value, as they depend only on the capricious, and fickle humour of the fovereign. If in these kingdoms the laws of religion were of the same nature as the human laws, the laws of religion too would be of no value. It is however necessary to the society, that it should have something fixed; and it is religion that has this stability.

3. The influence of religion proceeds from its being believed; that of human laws, from their being feared. Antiquity fuits with religion, because we have frequently a firmer belief of things in proportion to their distance: for we have no ideas annexed to them drawn from those times, which can contradict them. Human laws, on the contrary, receive advantage from their novelty, which implies the actual and particular attention of the legiflator to put them in execution.

CHAP. III.

Of civil laws contrary to the law of nature.

IF a flave, fays Plato *, defends himself, and kills a freeman, he ought to be treated as a parricide. This is a civil law which punishes self-defence, tho

dictated by nature.

The law of Henry VIII. which condemned a man, without being confronted by witnesses, was contrary to self-defence. In fact, in order to pass fentence of condemnation, it is necessary that the witnesses should know whether the man against whom they make their deposition is he whom they accuse, and that this man be at liberty to say, I am not the person you mean.

The law passed under the same reign, which condemned every woman who having carried on a criminal commerce did not declare it to the king before she married him, violated the regard due to natural modesty. It is as unreasonable to oblige a woman to make this declaration, as to oblige a man not to attempt the defence of his own life.

The Law of Henry II. which condemned the woman to death who lost her child, in case she did not make known her pregnancy to the magistrate,

^{*} Lib. 9. on laws.

was not less contrary to self-defence. It would have been sufficient to oblige her to inform one of her nearest relations, who might watch over the

preservation of the infant.

Gundebald † king of Burgundy decreed, that if the wife or fon of a person guilty of robbery did not reveal the crime, they were to become slaves. This law was contrary to nature: a wife to inform against her husband! a son to accuse his father! to avenge one criminal action, they ordained another still more criminal.

There has been much talk of a law in * England, which permitted girls feven years old to chuse a husband. This law was shocking two ways; it had no regard to the time when nature gives maturity to the understanding, nor to the time when she

gives maturity to the body.

Amongst the Romans, a father might oblige his daughter to repudiate † her husband, though he himself had consented to the marriage. But it is contrary to nature, for a divorce to be in the power

of a third person.

A divorce can be agreeable to nature, only when it is by confent of the two parties, or at least of one of them: but when neither consents, it is a monstrous kind of divorce. In short, the power of divorcement can be given only to those who feel the inconveniencies of marriage, and who are sensible of the moment when it is for their interest to make them cease.

+ Law of the Burgundians, tit. 47.

* Mr. Bayle, in his criticism on the history of Calvinism, speaks of this law, page 263.

† See law 5. in the code de repudiis et judicio de moribus fublato.

CHAP. IV.

The same subject continued.

THE law of * Receffuinthus permits the children of the adulteres, or those of her husband, to accuse her, and to put the slaves of the house to the torture. How iniquitous the law, which, to preserve a purity of morals, overturns nature, the

origin, the fource of all morality!

With pleasure we behold in our theatres a young hero express as much horrour against the discovery of his mother-in-law's guilt, as against the guilt itself. In his surprise, though accused, judged, condemned, proscribed, and covered with infamy, he scarcely dares to reflect on the abominable blood from which Phædra sprang; he abandons all that is most dear, the most tender object, all that lies nearest his heart, all that can fill him with rage, to deliver himself up to the unmerited vengeance of the gods. It is nature's voice, the sweetest of all founds, that inspires us with this pleasure.

CHAP. V.

Cases in which we may judge by the principles of the civil law, in limiting the principles of the law of nature.

AN Athenian law obliged † children to provide for their fathers, when fallen into poverty; it excepted those who were born of a ‡ courtezan, those whose chastity had been infamously prosti-

t Plutarch, life of Solen.

^{*} In the code of the Visigoths, lib iii. tit. 4. § 13. + Under pain of infamy, another under pain of imprisonment.

tuted by their father, and those whom he * had not learned any trade by which they might gain a livelihood.

The law considered that in the first case the father being uncertain, he had rendered the natural obligation precarious; that, in the fecond, he had fullied the life he had given, and done the greatest injury he could do to his children in depriving them of their reputation; that, in the third, he had rendered insupportable a life which had no means of fublistence. The law fuspended the natural obligation of children, because the father had violated his: it looked upon the father and the fon as no more than two citizens, and determined in refpect to them only from civil and political views; ever confidering, that a good republic ought to have a particular regard to manners. I am of opinion that Solon's law was good in the two first cases; that in which nature leaves the son ignorant who is his father, and that where it in a manner directs he should not know him: but I cannot approve of it in the third, where the father has only violated an obligation of the civil law.

CHAP. VI.

That the order of succession or inheritance depends on the principles of political or civil law, and not on those of the law of nature.

THE Voconian law ordained, that no woman should be left heiress to an estate, not even if she was an only child. Never was there a law, says St. Augustine ‡, more unjust. A formula of Marculfus † treats that custom as impious, which

^{*} Plutarch, life of Solon, and Gallienus in exhort. ad art. c. 8.

[†] De civitate Dei, lib. 3. † Lib. 2. cap. 12. Vol. II. B b deprives

deprives daughters of the right of fucceeding to the estate of their fathers. Justinian + gives the appellation of Barbarous, to the right which the males had formerly of succeeding in prejudice to the daughters. These notions proceed from having confidered the right dren to succeed to their fathers possessions, as a consequence of the law of nature; which it is not.

The law of nature ordains, that fathers shall provide for their children; but it does not oblige them to make them their heirs. The division of property, the laws of this division, and the fuccesfion after the death of the person who has had this division, can be regulated only by the community,

and confequently by political or civil laws.

It is true, that a political or civil order frequently demands that children should succeed to their father's estate; but it does not always make this

necessary.

There may be some reasons given why the laws of our fiefs appoint that the eldeft of the males, or the nearest relations of the male side should have all, and the females nothing: and why by the laws of the Lombards * the fifters, the natural children, the other relations; and, in their default, the treasury might share the inheritance with the

daughters.

It was regulated in some of the dynasties of China, that the brothers of the emperor should succeed to the throne, and that the children should not. If they were willing that the prince should have a certain degree of experience, if they feared his being too young, and if it was become necessary to prevent eunuchs from placing children fuccessively on the throne, they might very justly establish such an order of fuccession; and when some t writers

⁺ Novel. 21.

^{*} Lib. 2. tit. 14. § 6, 7, & 8. I Du Halde on the 2d dynasty.

have treated these brothers as usurpers, they have judged only from ideas received from the laws of their own countries.

According to the custom of Numidia *, Defalces, brother of Gala, succeeded to the kingdom; not

Maffiniffa, his fon.

There are monarchies merely elective; and fince it is evident, that the order of fuccession ought to be derived from the political or civil laws, it is for these to decide in what cases it is agreeable to reason, that the succession be granted to children, and in what cases it ought to be given to others.

In a kingdom of † Arabia, the day the fovereign mounted the throne, they fet guardians over all the pregnant women of the country, and the child who came first into the world was the heir-

apparent.

In countries where Polygamy is established, the prince has many children; the number of them is much greater in some of these countries than in others. There are || states where it is impossible for the people to maintain the children of the king: they might therefore make it a law, that the crown shall devolve, not on the king's children, but on those of his sister.

A prodigious number of children would expose the state to the most dreadful civil wars. The order of succession which gives the crown to the children of the sister, the number of whom is not larger than those of a prince who has only one wife, must prevent these inconveniencies.

There are people amongst whom reasons of state, or some maxims of religion, have made it necessary that the crown should be always fixed in a certain

* Livy, decad. 3. lib. 9. †Strabo,

As at Lovengo in Africa. See the collection of voyages that contributed to the establishment of an East-India company, vol. 4. part. 1. p. 114.

B b 2 family:

family: from hence, in India, proceeds the jealoufy of their * tribes, and the fear of losing the descent: they have there conceived that never to want princes of the blood-royal, they ought to take the children of the eldest sister of the king.

A general maxim: It is an obligation of the law of nature, to provide for our children; but to make them our successiours, is an obligation of the civil or political law. From hence are derived the different regulations, with respect to bastards, in the different countries of the world; these are according to the civil or political laws of each country.

CHAP. VII.

That we ought not to decide by the precepts of religion what belongs only to the law of nature.

THE Abyssines have a most severe Lent of sity days, which weakens them to such a degree, that for a long time they are incapable of business: the Turks † do not fail to attack them after their lent. Religion ought, in favour of the natural right of self-defence, to set bounds to these customs.

The Jews were obliged to keep the Sabbath; but it was an instance of great stupidity in this nation, not to defend themselves when their enemies chose to attack them on this day. Cambyses laying siege to Pelusium, set in the first rank a great number of those animals which the Ægyptians regard as sa-

* See edifying letters, col. 14. and the voyages that contributed to the establishment of an East-India company, vol. 3. part 2. p. 644.

† Collection of voyages that contributed to the eflablishment of an East-India company, vol. 4. p. 35.

& 163.

cred; the consequence was, that the soldiers of the garrison durit not molest them. Who does not see that self-defence is a duty superiour to every precept?

CHAP. VIII.

That we ought not to regulate by the principles of the canon law, things which should be regulated by those of the civil law.

BY the civil law of the Romans, he who took a thing privately from a facred place, was punished only for the guilt of thest: by the + canon law, he is punished for the crime of facrilege. The canon law takes cognizance of the place, the civil law of the fact. But to attend only to the place, is neither to reflect on the nature and definition of a thest, nor on the nature and definition of facrilege.

As the husband may demand a separation, by reason of the infidelity of his wife; the wife might formerly ‡ demand it, on account of the infidelity of the husband. This custom, contrary to a regulation made in the || Roman laws, was introduced into the ecclesiastic courts §, where nothing was regarded but the maxims of canon law; and indeed, if we consider marriage as a thing merely spiritual, and as relating only to the things of another

^{*} Leg. 5. ff. ad leg. Juliam peculatus.

[†] Capite quisquis 17. questione 4. Cujus observat. lib. 13. cap. 19. tom. 3.

[#] Beaufmanoir on the ancient custom of Beauvoisis, chap. 18.

Law of the first code, ad leg. Juliam de adul-

[§] At present they do not take cognisance of these things in France.

life, the violation is in both cases the same. But the political and civil laws of almost all nations. have with reason made a distinction between them. They have required from the women a degree of referve and continency, which they have not exacted from the men; because, in women, a violation of chastity supposes a renunciation of all virtue; because women, by violating the laws of marriage, quit the state of their natural dependence, because nature has marked the infidelity of women with certain figns; and, in fine, because the children of the wife born in adultery necessarily belong, and are an expense to the husband, while the children produced by the adultery of the husband, are not the wife's, nor are an expense to the wife.

CHAP. IX.

That things which ought to be regulated by the principles of civil law, can feldom be regulated by those of religion.

THE laws of religion have a greater sublimity,

the civil laws a greater extent.

The laws of perfection drawn from religion have more in view the goodness of the person that observes them, than of the society in which they are observed: the civil laws, on the contrary, have more in view the moral goodness of men in gene ral, than that of individuals.

Thus, venerable as those ideas are which immediately spring from religion, they ought not always to serve as a first principle to the civil laws; because these have another, the general welfare of

fociety.

The Romans made regulations amongst themfelves, to preserve the morals of their women; these were political institutions. Upon the establishment of monarchy, they made civil laws on this this head, and formed them on the principles of their civil government. When the Christian religion became predominant, the new laws that were then made had less relation to the general restitude of morals, than to the holiness of marriage; they had less regard to the union of the two sexes in a civil, than in a spiritual state.

At first, by the * Roman law a husband who brought back his wife into his house, after she had been found guilty of adultery, was punished as an accomplice in her debauch. Justinian +, from other principles, ordained, that during the space of two years he might go and take her again out of

the monastery.

Formerly, when a woman whose husband was gone to war, heard no longer any tidings of him, the might easily marry again, because she had in her hands the power of making a divorce. The law of ‡ Constantine obliged the woman to wait four years, after which she might fend the bill of divorce to the general; and, if her husband returned, he could not then charge her with adultery. But Justinian | decreed, that let the time be ever fo long after the departure of her husband. She should not marry, unless by the deposition and oath of the general she could prove the death of her husband. Justinian had in view the indisfolubility of marriage; but we may fafely fay, that he had it too much in view. He demanded a positive proof, when a negative proof was fufficient; he required a thing extremely difficult, to give an account of the fate of a man at a great distance, and exposed to so many accidents; he prefumed a crime, that is, a defertion of the husband, when it was so natural to presume his

^{*} Leg. 11. & ult. ff. ad leg. Juliam de adulteriis.

[†] Nov. 134. col. 9. cap. 10. tit. 170.

t Leg. 7. cod. de repudiis & judicio de morib. fublato.

Auth. hodie quantiscumque, code de repudiis.

death. He injured the commonwealth, by obliging women to live out of marriage; he injured individuals, by exposing them to a thousand dan-

gers.

The law of Justinian *, which ranked amongst the causes of divorce the consent of the husband and wife to enter into a monastery, was entirely opposite to the principles of the civil laws. It is natural that the causes of divorce should have their origin in certain impediments, which could not be foreseen, before marriage; but this desire of preserving chastity might be foreseen, since it is in ourselves. This law favours inconstancy in a state, which is by its very nature perpetual; it shocks the fundamental principle of divorce, which permits the dissolution of one marriage only from the hope of another. In short, if we view it in a religious light, it is no more than giving victims to God without a facrisice.

CHAP. X.

In what case we ought to follow the civil law which permits, and not the law of religion which forbids.

When a religion which prohibits polygamy is introduced into a country, where it is permitted, we cannot believe, (speaking only as a politician), that the laws of the country ought to suffer a man who has many wives to embrace this religion; unless the magistrate or the husband should indemnify them, by restoring them some way or other to their civil state. Without this their condition would be deplorable; no sooner would they obey the laws, than they would find themselves deprived of the greatest advantages of society.

^{*} Auth. quod hodie, cod de repudiis.

CHAP. XI.

That human courts of justice should not be regulated by the maxims of those tribunals which relate to the other life.

THE tribunal of the inquisition, formed by the Christian monks on the idea of the tribunal of penitence, is contrary to all good policy. It has every where met with a general diflike, and must have funk under the oppositions it met with, if those who were resolved to establish it, had not drawn advantages even from these oppositions.

This tribunal is insupportable in all governments. In monarchies, it only makes informers and traitors; in republics, it only forms dishonest men; in a despotic state, it is as destructive as the govern-

ment ittelf.

CHAP. XII.

The same subject continued.

T is one abuse of this tribunal, that of two perfons accused of the same crime, he who denies is condemned to die, and he who confesses, avoids the punishment. This has its source in monastic ideas, where he who denies, feems in a state of impenitence and damnation; and he who confesses, in a state of repentance and salvation. But a distinction of this kind can have no relation to human tribunals. Human justice, which sees only, the actions, has but one compact with men, namely, that of innocence; divine justice, which sees the thoughts, has two, that of innocence and repentance.

CHAP. XIII.

In what cases, with regard to marriages, we ought to follow the laws of religion, and in what cases we should follow the civil laws.

IT has happened in all ages and countries, that religion has been blended with marriages. When certain things have been considered as impure or unlawful, and were nevertheless become necessary, they were obliged to call in religion, to legitimate in the one case, and to reprove in others.

On the other hand, as marriage is of all human actions that in which fociety is most interested, it became proper that this should be regulated by the

civil laws.

Every thing which relates to the nature of marriage, its form, the manner of contracting it, the fruitfulness it occasions, which has made all nations consider it as the object of a particular benediction; a benediction which not being always annexed to it, is supposed to depend on certain superiour graces; all this, I say, is within the resort of religion.

The consequences of this union, with regard to property, the reciprocal advantages, every thing which has a relation to the new family, to that from which it sprung, and to that which is expected to arise; all this relates to the civil laws.

As one of the great objects of marriage is to take away that uncertainty which attends unlawful conjunctions, religion here stamps its seal, and the civil laws join theirs to it; to the end that it may be as authentic as possible. Thus, besides the conditions required by religion to make a marriage valid, the civil laws may still exact others.

The civil laws receive this power from their being additional obligations, and not contradictory ones.

The

The law of religion infifts upon certain ceremonies, the civil laws on the confent of fathers; in this case they demand something more than that of religion, but they demand nothing contrary to

It follows from hence, that the religious law must decide whether the bond be indissoluble, or not; for if the laws of religion had made the bond indiffoluble, and the civil laws had declared it might be broken, they would be contradictory to each other.

Sometimes the regulations made by the civil laws with respect to marriage, are not absolutely necesfary : fuch are those established by the laws, which, instead of annulling the marriage, only punish those who contract it.

Amongst the Romans the Papian law declared those marriages illegal which had been prohibited. and yet only subjected them to a penalty *; but a fenatufconfultum made at the instance of the emperour Marcus Antoninus, declared them void : there then no longer subsisted + any such thing as a marriage, wife, dowery, or husband. The civil laws determine according to circumstances: sometimes they are most attentive to repair the evil; at others to prevent it.

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^{*} See what hath been faid on this subject in book 23. chap. 21.

⁺ See law 16. ff. de ritu nuptiarum; and law 3. § 1. alfo Digeft. de donationibus inter virum & uxorem.

CHAP. XIV.

In what instances marriages between relations should be regulated by the laws of nature; and in what instances by the civil laws.

With regard to the prohibition of marriage between relations, it is a thing extremely delicate, to fix exactly the point at which the laws of nature stop, and where the civil laws begin. For this purpose we must establish some principles.

The marriage of the fon with the mother confounds the state of things: the sun ought to have an unlimited respect to his mother, the wife owes an unlimited respect to her husband; therefore the marriage of the mother to her son would subvert

the natural state of both.

Besides, nature has forwarded in women the time in which they are able to have children, but has retarded it in men: and, for the same reason, women sooner lose this ability, and men later. If the marriage between the mother and the son was permitted, it would almost always be the case, that when the husband was capable of entering into the views of nature, the wife would be incapable.

The marriage between the father and the daughter is contrary to nature, as well as the other; but it is less contrary, because it has not these two obstacles. Thus the Tartars, who may marry their daughters *, never marry their mothers, as we see

in the accounts we have of that nation +.

It has ever been the natural duty of fathers to watch over the chaftity of their children. Intrust-

* This law is very ancient amongst them. Attila, fays Priscus in his embassy, stopt in a certain place to marry Esca his daughter. A thing permitted, he adds, by the laws of the Scythians, p. 22.

+ Hift. of the Tartars, part 3. p. 236.

ed with the care of their education, they are obliged to preferve the body in the greatest perfection, and the mind from the least corruption; to encourage whatever has a tendency to inspire them with virtuous desires, and to nourish a becoming tenderness. Fathers, always employed in preserving the morals of their children, must have a natural aversion to every thing that can render them corrupt. Marriage, you will say, is not a corruption: but before marriage they must speak, they must make their persons beloved, they must seduce: it is this seduction which ought to inspire us with horrour.

There should be therefore an unsurmountable barrier between those who ought to give the education, and those who are to receive it; in order to prevent every kind of corruption, even though the motive be lawful. Why do fathers so carefully deprive those who are to marry their daughters, of their company and familiarity?

The horrour that arises against the incest of the brother with the sister should proceed from the same source. The desire of fathers and mothers to preserve the morals of their children and samilies untainted, is sufficient to inspire their offspring with a detestation of every thing that can lead to

the union of the two fexes.

The prohibition of marriage between confingermans has the same original. In the early ages, that is, in the times of innocence; in the ages when luxury was unknown, it was customary for children + upon their marriage, not to remove from their parents, but to settle in the same house, as a small habitation was at that time sufficient for

t It was thus amongst the ancient Romans.

a large family; the children + of two brothers, or cousin-germans, were considered both by others and themselves, as brothers. The estrangement then between the brothers and sisters, as to marriage ‡, subsisted also between the cousin-germans.

These principles are so strong and so natural, that they have had their influence almost all over the earth, independently of any communication. It was not the Romans who taught the inhabitants of Formosa ||, that the marriage of relations of the fourth degree was incestuous: it was not the Romans that communicated this sentiment to the Arabs §: it was not they who taught it to the inhabitants of the Maldivian islands *.

But if some nations have not rejected marriages between fathers and children, sisters and brothers; we have seen in the first book, that intelligent beings do not always follow the law of nature. Who could have imagined it! Religious ideas have frequently men them fall into these mistakes. If the Assyrians and the Persians married their mothers, the first were influenced by a religious respect for Semiramis, and the second did it because the reli-

+ Amongst the Romans they had the same name,

the cousin-germans were called brothers.

† It was thus at Rome in the first ages, till the people made a law to permit them; they were willing to favour a man extremely popular, who had married his cousin-german. Plutarch's treatise, intitled, Questions concerning the affairs of the Romans.

Collection of voyages to the Indies, vol. 5. parts

1. An account of the state of Formosa.

§ Koran, chap. of women.

* See Francis Pirard.

gion of Zoroaster gave a preference * to these marriages. If the Egyptians married their sisters, it proceeded from the wildness of the Egyptian religion, which consecrated these marriages in honour of Isis. As the spirit of religion leads us to attempt whatever is great and difficult, we cannot infer that a thing is natural from its being consecrated by a false religion.

The principle which informs us that marriages between fathers and children, between brothers and fifters, are prohibited, in order to preferve natural modesty in families, will help us to the discovery of those marriages that are forbidden by the law of nature, and of those which can be so only

by the civil law.

As children dwell, or are supposed to dwell in their father's house, and consequently the stepson with the stepmother, the stepsather with the step-daughter, or wife's daughter; the marriage between them is forbidden by the law of nature. In this case the resemblance has the same effect as the reality, because it springs from the same cause: The civil law neither can, nor ought to permit

these marriages.

There are nations, as we have already observed, amongst whom cousin germans are considered as brothers, because they commonly dwell in the same house; there are others, where this custom is not known. Among the first, the marriage of coufin-germans ought to be regarded as contrary to nature; not so among the others. But the laws of nature cannot be local. Wherefore, when these marriages are forbidden or permitted, they are, according to the circumstances, permitted or forbidden by a civil law.

It is not a necessary custom for the brother-in-

* They were considered as more honourable. See Philo de specialibus legib. quæ pertinent ad precepta decalogi. Paris, 1640, p. 778.

law and the fifter-in-law to dwell in the same house. The marriage between them is not then prohibited to preserve chastity in the family; and the law which forbids or permits it, is not a law of nature, but a civil law, regulated by circumstances, and dependent on the customs of each country: These are cases on which the laws depend on the morals or customs of the inhabitants.

The civil laws forbid marriages, when by the customs received in a certain country they are found to be in the same circumstances as those forbidden by the law of nature; and they permit them when this is not the case. The prohibitions of the laws of nature are invariable, because the thing on which they depend is invariable; the father, the mother, and the children, necessarily dwell in the same house. But the prohibitions of the civil laws are accidental, because they depend on an accidental circumstance; cousin-germans and others dwelling in the house by accident.

This explains why the laws of Moses, those of the Egyptians, and of many other nations, permitted the marriage of the brother-in-law with the sister in-law; whilst these very marriages were dis-

allowed by other nations.

In the Indies they have a very natural reason for admitting this fort of marriages. The uncle is there considered as the father, and is obliged to maintain and educate his nephew, as if he was his own child: This proceeds from the disposition of these people, which is good natured and full of humanity. This law, or this custom, has produced another; if a husband has lost his wife, he does not fail to marry her sister: And this is extremely natural, for his new consort becomes the mother of her sister's children, and not a cruel stepmother.

^{*} See law 8. of the code de incessis et inutilibus nuptiis.

CHAP.

CHAP. XV.

That we Should not regulate by the principles of political law, those things which depend on the principles of civil law.

As men have given up their natural independence to live under political laws, they have given up the natural community of goods to live under

civil laws.

By the first, they acquired liberty; by the second, property. We ought not to decide by the laws of liberty, which, as we have already said, is only the government of the community, what ought to be decided by the laws concerning property. It is a paralogism to say, that the good of the individual ought to give way to that of the public: This can never take place, but when the government of the community, or, in other words, the liberty of the subject is concerned; this does not affect those cases which relate to private property, because the public good consists in every one's having that property, which was given him by the civil laws, invariably preserved.

Cicero maintains that the agrarian laws were unjust; because the community was established with no other view, but that every one might be able to

preserve his property.

Let us therefore lay down as a certain maxim, that whenever the public-good happens to be the matter in question, it is never for the advantage of the public to deprive an individual of his property, or even to retrench the least part of it by a law, or a political regulation. In this case we should follow the rigour of the civil law, which is the Palladium of property.

Thus, when the public has occasion for the eftate of an individual, it ought never to act by the Vol. II. D d rigour rigour of political law: It is here that the civil law ought to triumph, who with the eyes of a mother regards every individual as the whole community.

If the political magistrate would erect a public edifice, or make a new road, he must indemnify those who are injured by it; the public is in this respect like an individual, who treats with an individual. It is full enough, that it can oblige a citizen to sell his inheritance, and that it can strip him of this great privilege which he holds from the civil law, the not being forced to alienate his possessions.

After the nations which subverted the Roman empire had abused their very conquests, the spirit of liberty called them back to that of equity. They exercised the most barbarous laws with moderation: And if any one should only doubt the truth of this, they need only read Beaumanoir's admirable work on jurisprudence, written in the twelfth century.

They mended the high-ways in his time, as we do at prefent. He fays, that when a highway could not be repaired, they made a new one as near the old as possible; but indemnified the proprietors at the * expence of those who reaped any advantage from the road. They determined at that time by the civil law; in our days we determine by the law

of politics.

CHAP. XVI.

That we ought not to decide by the rules of the civil law, when it is proper to decide by those of the political law.

MOST difficulties on this subject may be easily solved, by not confounding the rules derived

* The lord appointed collectors to receive the toll from the peafant, the gentlemen were obliged to contribute by the count, and the clergy by the bishop. Beaumanoir, chap. 22.

from property with those which spring from liber-

ty.

Is the demesne of a state or government alienable, or is it not? This question ought to be decided by the political law, and not by the civil. It ought not to be decided by the civil law, because it is as necessary that there should be demesnes for the subfishence of a state, as that the state should have civil laws to regulate the disposal of property.

If then they alienate the demelne, the state will be forced to make a new fund for another. But this expedient overturns the political government, because, by the nature of the thing, for every demesne that shall be established, the subject will always be obliged to pay more, and the fovereign to receive less; in a word, the demesne is necessary, and the alienation is not.

The order of fuccession is, in monarchies, founded on the welfare of the state, which makes it neceffary that this order should be fixed, to avoid the misfortunes, which, I have faid, must arise in a despotic kingdom, where all is uncertain, because

all is arbitrary.

The order of the fuccession is not fixed for the fake of the reigning family; but because it is the interest of the state, that it should have a reigning family. The law which regulates the succession of individuals, is a civil law, whose view is the interest of individuals; that which regulates the fuccession to monarchy, is a political law, which has in view the welfare and prefervation of the kingdom.

It follows from hence, that when the political law has established an order of succession in a kingdom, and this order is at an end, it is abfurd to reclaim the fuccession in virtue of the civil law of any nation whatfoever. One particular fociety does not make laws for another fociety. The civil laws of the Romans are no more applicable than amy other civil laws. They themselves did not make

Dd 2

use of them, when they proceeded against kings; And the maxims by which they judged kings, are so abominable, that they ought never to be revived.

It follows also from hence, that when the political law has obliged a family to renounce the succession, it is absurd to insist upon the restitutions drawn from the civil law. Restitutions are in the law, and may be good against those who live in the law: But they are not proper for such as have been raised up for the law, and who live for the law.

It is ridiculous to pretend to decide the rights of kingdoms, of nations, and of the universe, by the tame maxims on which (to make use of an expression of * Cicero) we should decide the right of a gutter between individuals.

CHAP. XVII.

The same subject continued.

OSTRACISM ought to be examined by the rules of the political, and not by those of the civil law; and so far is this custom from rendering a popular government odious, that it is, on the contrary, extremely adapted to prove its lenity. We should be sensible of this ourselves, if, while banishment is always considered amongst us as a penalty, we were able to separate the idea of ostracism from that of punishment.

Aristotle + tells us, that it is universally allowed that this practice has something in it both humane and popular. If in those times and places where this sentence was executed, they found nothing in it that appeared odious; is it for us, who see things

^{*} Lib. i. of laws. † Repub. lib. iii. cap. 13.

at fuch a distance, to think otherwise than the accusers, the judges, and the accused themselves?

And if we consider that this judgment of the people loaded the person with glory on whom it was passed; that when at Athens it sell upon a man without * merit, from that very moment they ceased to † use it; we shall find that numbers of people have entertained a false idea of it, and that it was an admirable law which could prevent the ill consequences which the glory of a citizen might produce, by loading him with new glory.

CHAP. XVIII.

That it is necessary to inquire, whether the laws which feem contradictory, are of the same class.

AT Rome the husband was permitted to lend his wife to another. Plutarch tells us this ‡ in express terms. We know that Cato lent his || wife to Hortensius, and Cato was not a man to violate

the laws of his country.

On the other hand, a husband who suffered his wife to be debanched, who did not bring her to justice, or who took her again after her § condemnation, was punished. These laws seem to contradict each other, and yet are not contradictory. The law which permitted a Roman to lend his wise was visibly a Lacedæmonian institution, established with a view of giving the republic children of a good species, if I may be allowed the term: The

* Hyperbolus. See Plutarch, life of Aristides.

| Plutarch, life of Cato.

[†] It was found opposite to the spirit of the legislator.

[†] Plutarch in his comparison between Lycurgus and Numa.

Leg. 11. § ult. ff. ad leg. Jul. de adulteriis.

other had in view the preservation of morals. The first was a law of politics, the second a civil law.

CHAP. XIX.

That we ought not to decide those things by the civil law, which ought to be decided by domestic laws.

THE law of the Vifigoths injoins, that the || flaves of the house shall be obliged to bind the man and woman they surprise in adultery, and to present them to the husband and to the judge: A terrible law, which puts into the hands of such mean persons the care of public, domestic, and private

vengeance!

This law can be no where proper but in the feraglios of the east, where the slave who has the charge of the inclosure, is deemed an accomplice upon the discovery of the least insidelity. He seizes the criminals, not so much with a view to bring them to justice, as to do justice to himself, and to obtain a scrutiny into the circumstances of the action, in order to remove the suspicion of his negligence.

But, in countries where women are not guarded, it is ridiculous to subject those who govern the fa-

mily, to the inquisition of their slaves.

This inquisition may, in certain cases, be at the most a particular domestic regulation, but never a civil law.

CHAP. XX.

That we ought not to decide by the principles of the civil laws, those things which belong to the law of nations.

IBERTY consists principally in not being forced to do a thing where the laws do not oblige.

Lib. iii. tit. 4. § 6.

People

People are in this state, only as they are governed by civil laws; and because they live under those ci-

vil laws, they are free.

It follows from hence, that princes who live not among themselves under civil laws, are not free; they are governed by force; they may continually force, or be forced. From hence it follows, that treaties made by force, are as obligatory as those made by free confent. When we who live under civil laws, are, contrary to law, constrained to enter into a contract, we may, by the assistance of the law, recover from the effects of violence : But a prince, who is always in that state in which he forces or is forced, cannot complain of a treaty which he has been obliged by violence to enter into. This would be to complain of his natural state; it would feem as if he would be a prince with respect to other princes, and as if other princes should be subjects with respect to him; that is, it would be contrary to the nature of things.

CHAP. XXI.

That we should not decide by political laws, things which belong to the law of nations.

POLITICAL laws demand that every man be subject to the criminal and civil courts of the country where he resides, and to the censure of the

fovereign.

The law of nations requires, that Princes shall send ambassadours; and a reason drawn from the nature of things does not permit these ambassadours to depend either on the sovereign to whom they are sent, or on his tribunals. They are the voice of the prince who sends them, and this voice ought to be free; no obstacle should hinder the execution of their office: They may frequently offend, because they speak for a man intirely independent;

they might be wrongfully accused of crimes, if they were liable to be punished for crimes; if they could be arrested for debts, these might be forged. Thus a prince who has naturally a bold and enterprising spirit, would speak by the mouth of a man who had every thing to sear. We must then be guided, with respect to ambassadours, by reasons drawn from the law of nations, and not by those derived from political law. But if they make an ill use of their representative character, a stop may be put to it by sending them back. They may even be accused before their master, who by this means becomes either their judge or their accomplice.

CHAP. XXII.

The unhappy state of the Ynca Athualpa.

THE principles we have just been establishing, were cruelly violated by the Spaniards. The Ynca Athualpa * could only be tried by the law of nations; they tried him by political and civil laws; they accused him for putting to death some of his own subjects, for having many wives, &c. and to fill up the measure of their stupidity, they condemned him, not by the political and civil laws of his own country, but by the political and civil laws of theirs.

CHAP. XXIII.

That when, by some circumstance, the political law becomes destructive to the state, we ought to decide by such a political law as will preserve it, which sometimes becomes a law of nations.

WHEN that political law which has established in the kingdom a certain order of succession,

^{*} See Garcillasso de la Vega.

becomes destructive to the body-politic, for whose fake it was established, there is not the least room to doubt but another political law may be made to change this order; and fo far would this law be from opposing the first, it would in the main be entirely conformable to it, fince both would depend on this principle, that THE SAFETY OF THE PEOPLE IS THE SUPREME LAW.

I have faid * that a great state becoming accessory to another, is itself weakened, and even weakens the principal. We know that it is for the interest of the state to have the supreme magistrate within itself, that the public revenues be well administered, that its specie be not sent abroad to enrich another country. It is of importance, that he who is to govern has not imbibed foreign maxims: These are less agreeable than those already established. Besides, men have an extravagant fondness for their own laws and customs: These constitute the happiness of every community; and, as we learn from the histories of all nations, are rarely changed without violent commotions, and a great effufion of blood.

It follows from hence, that if a great state has to its heir the possessor of a great state, the first may reasonably exclude him, because a change in the order of fuccession must be of service to both states. Thus a law of Russia made in the beginning of the reign of Elizabeth, most wisely excluded from the possession of the crown, every heir who possessed another monarchy; thus the law of Portugal difqualifies every ftranger who lays claim to the crown by right of blood.

But if a nation may exclude, it may with greater reason be allowed a right to oblige a prince to re-If the people fear that a certain marriage will be attended with such consequences, as shall

^{*} Book viii. chap. 17, et seq.

rob the nation of its dependence, or dismember fome of its provinces, it may very justly oblige the contractors and their descendents to renounce all right over them; while he who renounces, and those to whose prejudice he renounces, have the less reason to complain, as the state might originally have made a law to exclude them.

CHAP. XXIV.

That the regulations of the police are of a different class from other civil laws.

THERE are criminals, whom the magistrate punishes, there are others whom he reclaims. The first are subject to the power of the law, the others to his authority: Those are cut off from society; these they oblige to live according to the

rules of fociety.

In the exercise of the police, it is rather the magistrate who punishes than the law; in the sentence paffed on crimes, it is rather the law which punishes than the magistrate. The business of the police confifts of affairs which arife every instant, and are commonly of a trifling nature: There is then but little need of formalities. The actions of the police are quick, they are exercised over things which return every day; it would be therefore improper for it to inflict severe punishments. continually employed about minute particulars; great examples are therefore not defigned for its purpose. It is governed rather by regulations than laws; those who are subject to its jurisdiction, are incessantly under the eye of the magistrate: It is therefore the fault of the magistrate if they fall into excess. Thus we ought not to confound a flagrant violation of the laws, with a simple breach of the police; these things are of a different order.

From hence it follows, that the laws of that Ita-

ian * republic, where bearing fire arms is punished as a capital crime, and where it is not more fatal to make an ill use of them, than to carry them, is not agreeable to the nature of things.

It follows moreover, that the applauded action of that emperour, who caused a baker to be impaled whom he found guilty of a fraud, was the action of a Sultan, who knew not how to be just, without committing an outrage on justice.

CHAP. XXV.

That we should not follow the general dispositions of the civil law, in things which ought to be subject to particular rules drawn from their own nature.

Is it a good law, that all civil obligations passed between sailors in a ship in the course of a voyage should be null? Francis Pirard + tells us, that in his time it was not observed by the Portuguese, though it was by the French. Men who are together only for a short time; who have no wants, fince they are provided for by the prince, who have only one object in view, that of their voyage; who are no longer in fociety, but are only the inhabitants of a ship, ought not to contract obligations that were never introduced, but to support the burthen of civil fociety.

In the same spirit was the law of the Rhodians. made at a time when they always followed the coafts; it ordained that those who during a tempest staid in a vessel, should have ship and cargo. and those who quitted it should have nothing.

^{*} Venice.

[†] Chap. xiv. p. 12.

BOOK XXVII.

Of the Origin and Revolutions of the Roman laws on Successions.

CHAP. I.

Of the Roman laws on Successions.

THIS affair derives its establishment from the most distant antiquity; and to penetrate to its foundation, permit me to search among the first laws of the Romans, for what, I believe, nobody has yet been so happy as to discover.

We know that Romulus * divided the land of his little kingdom among his subjects; it seems to me, that from hence the laws of Rome on succes-

fions were derived.

The law of the division of lands made it necessary that the property of one family should not pass into another: From hence it followed, that there were but two orders of heirs established by law †, the children and all the descendents that were not emancipated, but lived under the power of the father, whom they called fui heredes, or his natural heirs: And in their default, the nearest relations on the male-side, whom they called agnati.

It followed likewise, that the relations on the semale-fide whom they called *cognati*, ought not to succeed; they would have conveyed the estate into

another family, which was not allowed.

Dionyf. Halicar. lib. ii. c. 3. Plutarch, compa-

rifon between Numa and Lycurgus.

+ At si intestato moritur cui suus heres nec extabit, agnatus proximus familiam habeto. Fragment of the law of the twelve tables in Ulpian, the last title.

From

From thence also it followed, that the children ought not to succeed to the mother, nor the mother to her children; for this might carry the estate of one family into another. Thus we see them excluded * by the law of the twelve tables; it called none to the succession but the agnati, and there was no agnation between the son and the mother.

But it was indifferent whether the fuus heres, or, in default of such, the nearest by agnation, was male or female; because, as the relations on the mother's side could not succeed, though a woman who was an heires should happen to marry, yet the estate always returned into the family from whence it came. On this account the law of the twelve tables does not distinguish, whether the perfon + who succeeded was male or female.

This was the cause, that though the grandchildren by the son succeeded to the grandfather, the grandchildren by the daughter did not succeed; for, to prevent the estate from passing into another samily, the agnati were preferred before them. Hence the daughter, and not her ‡ children, suc-

ceeded to the father.

Thus amongst the primitive Romans the women succeeded, when this was agreeable to the law of the division of lands; and they did not succeed

when this law might fuffer by it.

Such were the laws of fuccession among the primitive Romans; and as these had a natural dependence on the constitution, and were derived from the division of lands, it is easy to perceive that they had not a foreign original, and were not of the number of those brought into the republic by the deputies sent into the cities of Greece.

^{*} See the frag. of Ulpian, § 8. tit. 26. Inst. tit. 3.

[†] Paulus, lib. iv. fent. tit. 8. § 3.

[‡] Inst. lib. iii. § 15.

Dionysius Halicarnassus * tells us, that Servius Tullius finding the laws of Romulus and Numa on the division of lands abolished, he restored them and made new ones, to give the older a greater weight. We cannot therefore doubt, but that the laws we have been speaking of, made in consequence of this division, were the work of these three Roman legislators.

The order of fuccession having been established in consequence of a political law, no citizen was allowed to break in upon it by his private will; that is, in the first ages of Rome, he had not the power of making a testament. Yet it would have been hard to deprive him, in his last moments, of the friendly commerce of kind and beneficent actions.

They therefore found a method of reconciling, in this respect, the laws with the desires of the individual. He was permitted to dispose of his substance in an assembly of the people, and thus every testament was, in some fort, an act of the legisla-

tive power.

The law of the twelve tables permitted the perfon who made his will, to chuse which citizen he pleased for his heir. The reason that induced the Roman laws so strictly to restrain the number of those who might succeed ab intestate, was the law of the division of lands; and the reason why they extended so widely the power of the testator, was, that as the father might sell + his children, he might with greater reason deprive them of his substance. These were therefore different effects, since they slowed from different principles; and such is, in this respect, the spirit of the Roman laws,

* Lib. iv. p. 276.

[†] Dionysius Halicarnassus proves by a law of Numa, that the law which permitted a father to sell his son three times, was made by Romulus, and not by the Decemvirs. Lib. 2.

The ancient laws of Athens did not permit a citizen to make a will. Solon * permitted it, with an exception to those who had children: And the legislators of Rome, filled with the idea of paternal power, permitted the making a will even to the prejudice of their children. It must be confessed, that the ancient laws of Athens were more confistent than those of Rome. The indefinite permission of making a will, which had been granted to the Romans, ruined by little and little the political regulation on the divisions of lands: It was the principal thing that introduced the fatal difference between riches and poverty: Many shares were united in the fame person; some citizens had too much, and a multitude of others had nothing. Thus the people being continually deprived of their shares, were incessantly calling out for a new difiribution of lands. They demanded it in an age when the frugality, the parfimony, and the poverty of the Romans were their diftinguishing characteristic; as well as at a time when their luxury was become still more astonishing.

Testaments being properly a law made in the assembly of the people, those who were in the army were thereby deprived of a testamentary power. The people therefore gave the soldiers the privilege + of making before their companions, the dispositions which ‡ should have been made before

them.

* See Plutarch, life of Solon.

† This testament, called in procinctu, was different from that which they called military, which was established only by the constitutions of the emperours, leg. 1. ff. de milit. test. This was one of the artifices by which they cajoled the soldiers.

† This testament was not in writing, and it was without formality, fine libra et tabulis, as Cicero says,

lib. i. de oratore.

The great affembly of the people met but twice a year; besides, both the people and affairs brought before them were increased: they therefore judged it convenient to permit all the citizens to make their ‡ will before some Roman citizens of ripe age, who were to represent the body of the people: they took five || citizens, before whom the inheritor § purchased his family, that is, his inheritance, of the testator; another citizen brought a pair of scales to weigh the value; for the Romans * as yet had no money.

To all appearance these five citizens were to represent the five classes of the people; and they set no value on the sixth, as being composed of men

who had no property.

We ought not to fay, with Justinian, that these fales were merely imaginary; they became, indeed, imaginary in time, but were not so originally. Most of the laws which afterwards regulated wills, were built on the reality of these sales: we find sufficient proof of this in the Fragments of Ulpian †. The deaf, the dumb, the prodigal, could not make a will; the deaf, because he could not hear the words of the buyer of the inheritance; the dumb, because he could not pronounce the terms of nomination; the prodigal, because, as he was excluded from the management of all affairs, he could not sell his inheritance. I omit any further examples.

Wills being made in the affembly of the people,

|| Ulpian, tit, 10. § 2.

1.

+ Tit. 20. § 13.

[†] Institut. lib. 2. tit. 10. § 1. Aulus Gellius, lib. 15. cap. 27. They called this form of testament per es & libram.

[§] Theoph. inst. lib. 2. tit. 10.

* T. Livy, lib. 4. nondum. argentum fignatum eral.
He speaks of the time of the siege of Veii.

were rather the acts of political than of civil laws, a public rather than a private right; from whence it followed that the father, while his fon was under his authority, could not give him leave to make a will.

Wills, among most nations, are not subject to greater formalities than ordinary contracts: because both the one and the other are only expressions of the will of him who makes the contract, and both are equally a private right. But, among the Romans, where testaments were derived from the public law, they were attended with much greater formalities * than other affairs; and this is still the case in those provinces of France which are govern-

ed by the Roman law.

Testaments being, as I have said, a law of the people, they ought to be made with the force of a command, and in such terms as are called direct and imperative †. Hence a rule was formed, that they could neither give nor transmit an inheritance, without making use of the imperative words: from whence it followed, that they might very justly in certain cases make a substitution ‡; and ordain, that the inheritance should pass to another heir; but that they could never make a siduciary bequest ||, that is, charge any one in terms of intreaty to restore an inheritance, or a part of an inheritance, to another.

When the father neither inftituted his fon his heir, not difinherited him, the will was annulled; but it was valid, though he did not difinherit his

+ Let Titius be my heir.

Vulgar, pupillary, and exemplary.

Augustus, for particular reasons, first began to authorise the fiduciary bequest, which in the Roman law was called fideicommissum. Instit. lib. ii. tit. 23. in procemio.

^{*} Instit. lib. 2. tit. 10. § 1.

daughter, nor institute her his heires. The reafon is plain: when he neither instituted nor disinherited his son, he did an injury to his grandson, who might have succeeded ab intestate to his father; but in neither instituting nor disinheriting his daughter, he did no injury to his daughter's children, who could not succeed ab intestate to their mother §; because they were neither sui heredes nor

agnati.

The laws of the ancient Romans concerning successions being formed with the same spirit which dictated the division of lands, did not sufficiently restrain the riches of women; by this means a door was left open to luxury, which is always inseparable from this sort of riches. Between the second and third Punic war, they began to perceive the evil, and made the Voconian * law; but as they were induced to this by the most important considerations, moreover as but sew monuments have reached us that take notice of this law, and as it has hitherto been spoken of in a most consused manner, I shall endeavour to clear it up.

Cicero has preserved a fragment, which forbids the instituting a woman an + heires, whether she

was married or unmarried.

The epitome of Livy, where he speaks of this law, says no ‡ more: it appears from || Cicero and

§ Ad Liberos matris intestatæ hereditas, lib. 12. tab. non pertinebat, quia feminæ suos heredes non habent. Ulpian. fragm. tit. 26. § 7.

* It was proposed by Quintus Voconius, tribune of the people. See Cicero's second oration against Verres. In the epitome of T. Livy, lib. 41. we should read Voconius, instead of Volumnius.

† Sanxit . . . ne quis heredem virginem neve mulierem faceret. Cicero's fecond oration against Verres.

† Legem tulit, ne quis heredem mulierem institueret

|| Second oration against Verres.

St. Augustine *, that the daughter, though an only child, was comprehended in the prohibition.

Cato the elder † contributed all in his power, to get this law passed. Aulus Gellius cities a fragment † of a speech which he made on this occasion. By preventing the succession of women, his intent was to take away the source of luxury; as, by undertaking the defence of the Oppian law, he intended

to put a ftop to luxury itself.

In the inftitutes of Justinian | and Theophilus & mention is made of a chapter of the Voconian law, which limits the power of bequeathing. In reading these authors, every body would imagine that this chapter was made to prevent the inheritance from being so exhausted by legacies, as to make it unworthy of the heir's acceptance. But this was not the spirit of the Voconian law. We have just seen that they had in view the hindering women from inheriting an estate. The articles of this law, which set bounds to the power of bequeathing, entered into this view: for if people had been possessed into the liberty to bequeath as much as they pleased, the women might have received as legacies, what they could not receive by succession.

The Voconian law was made to hinder the women from growing too wealthy; for this end it was necessary to deprive them of large inheritances, and not of such as could not give rise to luxury. Thus we find in Cicero +, that women were rendered incapable of succeeding to none but those who were rated high in the censor's books ++.

The

^{*} Of the city of God, lib. 3.

[†] Epitome of Livy, lib. 41.

[‡] Lib. 17. cap. 6.

[|] Instit. lib. 3. tit. 22. § Ibid.

⁺ Second oration against Verres.

⁺⁺ Qui census esset, which Dio, lib. 56. explains of F f 2 him

The civil wars were the destruction of an infinite number of citizens. Under Augustus, Rome was almost deserted: it was necessary to repeople it. They made the Papian laws, which omitted nothing that could encourage * the citizens to marry, and procreate children. One of the principal means was to increase †, in favour of those who gave into the views of the law, the hopes of being heirs, and to diminish the hopes of those who resused; and as the Voconian law had rendered women incapable of succeeding, the Papian law, in certain cases, dispensed with this prohibition.

Women ‡, especially those who had children, were rendered capable of receiving in virtue of the will of their husbands; they even might, when they had children, receive in virtue of the will of strangers. All this was in direct opposition to the regulations of the Voconian law: and yet it is remarkable, that the spirit of this law was not entirely abandoned. For example, the Papian law, which permitted a man who had one child || to receive an entire inheritance by the will of a stranger granted the same favour to the wife only when she had three children §.

him who had a hundred thousand, that is, of him who had the first census, as we may see in Livy, lib. 1. and Dionysius Halicarnassus.

* See what has been faid in book 23. chap. 21. † The fame difference occurs in feveral regulations of the Papian law. See the fragments of Ulpian. §

4. 5. & 6.

‡ See fragm. of Ulpian, tit. 15. § 16.

Jura parentis habes, propter me scriberes heres.

Juvenal, sat. 9.

§ See law 9. c. Theod. de bonis proscriptorum, & Dio, lib. 55. See the fragm. of Ulpian, tit. last, § 6. and ti. 29. § 3.

It must be remarked, that the Papian law did not render the women who had three children capable of succeeding, except in virtue of the will of strangers; and that, with respect to the succession of relations, it left the ancient laws, and particularly the † Voconian, in all their force. But this

did not long subsist.

Rome, corrupted by the riches of every nation, had changed her manners; the putting a ftop to the luxury of women was no longer minded. Aulus Gellius, who lived under ‡ Adrian, tells us, that in his time the Voconian law was almost abolished; it was buried under the opulence of the city. Thus we find in the sentences of Paulus ||, who lived under Niger, and in the fragments of Ulpian §, who was in the time of Alexander Severus, that the fisters on the father's side might succeed, and that none but the relations of a more distant degree were in the case of those prohibited by the Voconian law.

We find t by the proceedings of Verres, that the prætors extended or reftrained the Voconian law at pleasure. The ancient laws of Rome began to be thought severe. The prætors, moved by nothing but reasons of equity, moderation, and decorum, enervated all these laws. This is because the great advantages resulting from laws he often closely concealed, while the little inconveniencies that attend them are most sensibly felt.

We have feen that by the ancient laws of Rome mothers had no share in the inheritance of their children. The Voconian law afforded a new rea-

^{*} Fragm. of Ulpian. tit. 16. § 1. Sozomenus, lib. 1. cap. 6.

[‡] Lib. 20. cap. 1. || Lib. iv. tit. 8. § 3.

[§] Tit. 26. § 6.

[†] Cicero, second oration against Verres.

fon for their exclusion. But the emperor Claudius gave the mother the succession of her children as a consolation for their loss. The Tertulian senatus consultum, made under Adrian +, gave it them when they had three children, if free women, or four, it they were freed women. It is evident, that this decree of the senate was only an extension of the Papian law, which in the same case had granted to women the inheritances lest them by strangers. At length Justinian ‡ granted them the succession independently of the number of their children.

The fame causes which had debilitated the law that prevented the fuccession of women, subverted that by degrees which had limited the fuccession of the relations of the woman's fide. These laws were extremely conformable to the spirit of a good republic, where they ought to have fuch an influence, as to prevent this fex from taking a pride in luxury, in riches, or in the hopes of obtaining riches. On the contrary, the luxury of a monarchy rendering marriage expensive and costly, it ought to be there enouraged, both by the riches which women may bestow, and by hope of the inheritances it is in their power to procure. Thus when monarchy was established at Rome, the whole fystem of fuccessions was changed. The prætors called the relations of the woman's fide in default of those of the male fide, though, by the ancient laws, the relations of the woman's fide were never called. The Orphitian fenatusconfultum called children to the succession of their mother; and the emperors Valentinian |, Theodofius, and Arcadi-

† Lib. ii. cod. de jure liberorum. Instit. tit. 3. §

[†] That is, the Emperor Pius, who changed his name to that of Adrian by adoption.

Lib. 9. cod. de suis & legitimis heredibus.

us, called the grandchildren by the daughter to the fuccession of the grandfather. In short, the emperor Justinian § left not the least vestige of the ancient rights of successions: he established three orders of heirs, the descendents, the ascendents, and the collaterals, without any distinction between the males and semales, between the relations on the woman's side, and those on the male side, and abrogated all of this kind, which were still in sorce: he believed that he followed nature even in deviating from what he called the embarrassiments of the ancient jurisprudence.

BOOK XXVIII.

Of the origin and revolutions of the civil laws among the French.

In nova fert animus mutatas dicere formas.

Corpora——— OVID. METAM.

CHAP. I.

Different character of the laws of the several people of Germany.

A Fter the Franks had quitted their country, they made a compilement of the Salic laws, with the affiftance of * the fages of their own na-

Lib. 14. cod. de suis & legitimis heredibus, &

Nov. 118. & 127.

* See the prologue to the Salic law. Mr. Leibnitz fays, in his treatife of the origin of the Franks, that this law was made before the reign of Clovis: but it could not be before the Franks had quitted Germany, for they did not at that time understand the Latin tongue.

tion. The tribe of the Ripuarian Franks having joined itself under Clovis + to that of the Salians, preserved its own customs; and Theodoric \$ king of Auftrafia ordered them to be reduced into writing, He collected likewife | the customs of those Baya. rians and Germans who were dependent on his kingdom. For Germany having been weakened by the migration of fuch a multitude of people, the Franks, after conquering all before them, turned back their victorious arms, and extended their dominion into the forests of their ancestors. Very likely the Thuringian code * was given by the same Theo. doric, fince the Thuringians were also his subjects. As the Frifians were fubdued by Charles Martel, and Pepin, their & law cannot be prior to those princes. Charlemagne, the first that reduced the Saxons, gave them the law still extant; and we need only read these two last codes, to be convinced they came from the hands of conquerors. foon as the Vifigoths, the Burgundians, and the Lombards, had founded their respective kingdoms, they reduced their laws into writing, not with an intent of obliging the vanquishing nations to conform to their customs, but with a design of following them themselves.

There is an admirable simplicity in the Salic and Ripuarian laws, as well as in those of the Allemans, Bavarians, Thuringians, and Frisians. They breathe an original rudeness, and a spirit which no change or corruption of manners had weakened. They received but very few alterations, because all those people, except the Franks, remained in Ger-

+ See Gregory of Tours.

[‡] See the prologue to the law of the Bavarians, and that to the Salic law. | Ibid.

^{*} Lex Angliorum Werinorum, hoc est, Thuringo-

They did not know how to write.

The

many. Even the Franks themselves laid there the foundation of a great part of the empire; so that they had none but German laws. The same cannot be said of the laws of the Visigoths, of the Lombards and Burgundians; their character altered considerably from the great change which happened in the character of those people, who had

fettled in their new habitations.

The kingdom of the Burgundians did not last long enough to admit of great changes in the laws of the conquering nation. Gundebald and Sigifmond, who collected their customs, were almost the last of their kings. The laws of the Lombards received additions rather than changes. The laws of Rotharis were followed by those of Grimoaldus, Luitprandus, Rachis, and Astulphus; but did not assume a new form. It was not so with the laws of the Visigoths *; their kings new-moulded them, and had them also new-moulded by the clergy.

The kings indeed of the first race struck out of the Salic and the Ripuarian laws, whatever was absolutely inconsistent with Christianity; but left the main part untouched. This cannot be said of

the laws of the Visigoths.

The laws of the Burgundians, and especially those of the Visigoths, admitted of corporal punishments: these were not tolerated ‡ by the Salic and Ripuarian laws; they preserved their character much better.

*They were made by Euric, and amended by Leovigildus. See Isidorus's chronicle. Chaindasuinthus and Recessuinthus reformed them. Egigas ordered the code now extant to be made, and commissioned bishops for that purpose; nevertheless, the laws of Chaindasuinthus and Recessuinthus were preserved, as appears by the sixth council of Toledo.

+ See the prologue to the law of the Bavarians.

We find a few only in Childebert's decree. Vol. II. G g

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They did not know how to write.

^{*} Lex Angliorum Werinorum, hoc est, Thuringo-

many. Even the Franks themselves laid there the foundation of a great part of the empire; so that they had none but German laws. The same cannot be said of the laws of the Visigoths, of the Lombards and Burgundians; their character altered considerably from the great change which happened in the character of those people, who had

fettled in their new habitations.

The kingdom of the Burgundians did not last long enough to admit of great changes in the laws of the conquering nation. Gundebald and Sigismond, who collected their customs, were almost the last of their kings. The laws of the Lombards received additions rather than changes. The laws of Rotharis were followed by those of Grimoaldus, Luitprandus, Rachis, and Astulphus; but did not assume a new form. It was not so with the laws of the Visigoths *; their kings new-moulded them, and had them also new-moulded by the clergy.

The kings indeed of the first race struck out of the Salic and the Ripuarian laws, whatever was absolutely inconsistent with Christianity; but left the main part untouched. This cannot be said of

the laws of the Vifigoths.

The laws of the Burgundians, and especially those of the Visigoths, admitted of corporal punishments: these were not tolerated ‡ by the Salic and Ripuarian laws; they preserved their character much better.

*They were made by Euric, and amended by Leovigildus. See Isidorus's chronicle. Chaindasuinthus and Recessuinthus reformed them. Egigas ordered the code now extant to be made, and commissioned bishops for that purpose; nevertheless, the laws of Chaindasuinthus and Recessuinthus were preserved, as appears by the sixth council of Toledo.

+ See the prologue to the law of the Bavarians.

We find a few only in Childebert's decree.

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The Burgundians and Visigoths, whose provinces were greatly exposed, endeavoured to conciliate the affections of the ancient inhabitants, and to give them the most impartial civil laws ||; but as the kings of the Franks had established their power, they had no such & considerations.

The Saxons, who lived under the dominion of the Franks, were of an untractable temper, and prone to revolt. Hence we find in their * laws the feverities of a conqueror, which are not to be met with in the other codes of the laws of the bar-

barians.

We see the spirit of the German laws in the pecuniary punishments, and the spirit of a conqueror

in those of an afflictive nature.

The crimes they commit in their own country are subject to corporal punishment; and the spirit of the German laws is followed only in the punishment of crimes committed beyond the extent of their own territory.

They are plainly told, that their crimes shall meet with no mercy, and they are refused even the

afylum of churches.

The bishops had an immense authority at the court of the Visigoth kings; the most important affairs being debated in councils. All the maxims, principles, and views of the present inquisition, are owing to the code of the Visigoths; and the monks have only copied against the Jews, the laws formerly enacted by bishops.

In other respects the laws of Gundebald for the

† See lower down, chap. 3.

Burgundians

^{||} See the prologue to the code of the Burgundians, and the code itself, especially tit. 12. § 5. and tit. 38. See also Gregory of Tours, book 2. chap. 33. and the code of the Visigoths.

[§] Jee lower down, chap. 3. * See chap. 2. § 8. and 9. & chap. 4. § 2. & 7.

Burgundians feem pretty judicious; and those of Rotharis, and of the other Lombard princes, are still more so. But the laws of the Visigoths, those, for instance, of Recessianthus, Chaindasuinthus, and Egigas, are puerile, ridiculous, and foolish; they attain not their end; they are stuffed with rhetoric, and void of sense, frivolous in the substance, and bombastic in the style.

CHAP. II.

That the laws of the Barbarians were all personal.

IT is a distinguishing character of these laws of the Barbarians, that they were not confined to a certain district; the Frank was tried by the law of the Franks, the Aleman by the law of the Alemans, the Burgundian by that of the Burgundians, the Roman by the Roman law: nay, so far were the conquerors in those days from reducing their laws to an uniform system or body, that they did not even think of becoming legislators to the people

they had conquered.

The original of this I find in the manners of the German people. These nations were parted asunder by marshes, lakes, and forests; and Cæsar * observes, they were fond of such separations. Their dread of the Romans brought about their reunion; and yet each individual among these mixed people was still to be tried by the established customs of his own nation. Each people apart was free and independent, and when they came to be intermixed, the independency still continued; the country was common, and the government peculiar; the territory the same, and the nations different. The spirit of personal laws prevailed therefore among these people before ever they set out

^{*} De bello Gallico, lib. 6.

from their own homes, and they carried it with

them into their conquests.

We find this custom established in the formulas of Marculsus *, in the codes of the laws of the Barbarians, but chiefly in the law of the Ripuarians †, and in the decrees of the kings of the first race ‡, from whence the capitularies made on that subject in the second | race were derived. The children § followed the law of their father, the wife ‡ that of the husband, the widow + came back to her own original law, and the freedman ++ was under that of his patron. Besides, every man could make choice of what laws he pleased; but the constitution of = Lotharius I. required this choice should be made public.

CHAP. III.

Capital difference between the Salic laws, and these of the Visigoths and Burgundians.

WE have already observed, that the laws of the Burgundians and Visigoths were impartial; not so the Salic law, for it established between the Franks and Romans the most mortifying distinctions. When a Frank, a Barbarian, or one living under the Salic law happened to be killed, a com-

* Lib. i. formul 8. † Chap. 31.

‡ That of Clotarius in 560. Balusius's edit. of the

capitularies, tome i. art. 4. ibid. in fine.

| Capitul. added to the law of the Lombards, lib. i. tit. 25. cap. 71. lib. ii. tit. 41. cap. 7. et tit. 56. cap. 1. et 2.

§ Ibid. lib. ii. tit. 5.

+ Ibid. + Ibid. chap. 2.

++ Ibid. lib. ii. tit. 35. cap. 2.

In the law of the Lombards, lib. ii. tit. 57.

position of 200 fols was to be paid to his relations *; only 100 upon the killing of a Roman possessor t, and no more than 45 for a Roman tributary. The composition for the murder of one of the king's vaffals, if a Frank t, was 600 fols; if a Roman, though the king's guest |, only 300 %. The Salic law made therefore a cruel diffinction between the Frank and Roman lord, and the Frank and Roman commoner.

Farther, if a number of people were got together to affault a Frank in his house 4, and he happened to be killed, the Salic law ordained a composition of 600 fols; but if a Roman or a freedman + was affaulted, only half that composition. By the same law ++, if a Roman put a Frank in irons, he was liable to a composition of 30 sols; but if a Frank had thus used a Roman, he paid only 15. A Frank stript by a Roman was intitled to a compofition of 62 fols, and a Roman stript by a Frank received only 30. Such unequal treatment must needs have been very grievous to a Roman,

And yet a celebrated author = forms a system of the establishment of the Franks in Gaul, on a suppofition that they were the best friends of the Ro-

* Salic law, tit. 44. § 1. † Qui res in pago ubi remanet proprias habet. Salic law, tit. 44. § 15. See also § 7.

Qui in truste dominica est. Ibid. tit. 44. 9 4. Si Romanus homo conviva regi tuerit. Ibid. § 6.

The principal Romans followed the court, as may be feen by the lives of feveral bithops, who were there educated; there were hardly any but Romans that knew how to write.

4 Ibid. tit. 45.

+ Lydus, whose condition was better than that of a bondman. Law of the Alemans, chap. 95.

⁺⁺ Tit. 35. § 3, et 4. - The Abbé Du Bos.

mans; they who did, and they who fuffered * from, the Romans fuch an infinite deal of mischief! The Franks, the friends of the Romans, they who, after subduing them by their arms, oppressed them in cold blood by their laws! They were exactly the Friends of the Romans, as the Tartars who conquered China were the Friends of the Chinese.

If some Catholic bishops thought fit to make use of the Franks in destroying the Arrian kings, does it follow, that they had a desire of living under those barbarous people? And can we from hence conclude, that the Franks had any particular regard for the Romans? I should draw quite different consequences: The less the Franks had to fear from the Romans, the less indulgence they had for them.

The Abbé du Bos has consulted but indifferent authorities for his history, such as poets and orators: Works of parade and oftentation are improper foundation for buildings systems.

CHAP. IV.

In what manner the Roman law came to be lost in the country subject to the Franks, and preserved in that subject to the Goths and Burgundians.

WHAT has been above faid will throw fome light upon other things, which have hither-

to been involved in great obfcurity.

The country at this day called France, was, under the first race, governed by the Roman law, or the Theodosian code, and by the different laws of the barbarians †, who settled in those parts.

* Witness the expedition of Arbogastes in Gregory of Tours, hist. lib 2.

† The Franks, Vifigoths, and Burgundians.

In the country subject to the Franks, the Salic law was established for the Franks, and the *Theodosian code for the Romans. In that subject to the Visigoths, a compilement of the Theodosian code, made by order of Alaric †, regulated disputes among the Romans; the national customs which Euric ‡ caused to be reduced into writing, determined those among the Visigoths. But how comes it, some will say, that the Salic laws gained almost a general authority in the country of the Franks, and the Roman law gradually declined; whilst in the jurisdiction of the Visigoths the Roman law spread itself, and obtained at last a general sway?

My answer is, that the Roman law came to be disused among the Franks, because of the great advantages accruing from being a Frank, a barbarian ||, or a perion living under the Salic law; every one in that case readily quitting the Roman to live under the Salic law. The \(\gamma\) clergy alone retained it, as a change would be of no advantage to them. The difference of conditions and ranks consisted only in the largeness of the compositions, as I shall show in another place. Now 4 particular laws al-

lowed

* It was finished in 438.

† The 20th year of the reign of this prince, and published two years after by Anian, as appears by the preface to that code.

The year 504 of the Spanish æra, the chronicle

of Isidorus.

Francum, aut barbarum, aut hominem qui Sa-

lica lege vivit. Salie law, tit. 44. § 1.

§ According to the Roman law under which the church lives, as is faid in the law of the Ripuarians, tit. 58. § 1. See also the numberless authorities on this head produced by Du Cange, under the word Lex Romana.

4 See the capitularies added to the Salic law in Lindembroke, lowed the clergy as favourable compositions, as those of the Franks; for which reason they retained the Roman law. This law brought no hardthips upon them; and in other respects it was properest for them, as it was the work of Christian emperours.

On the other hand, in the patrimony of the Vifigoths, as the Vifigoth law * gave no civil advantages to the Visigoths over the Romans, the latter had no reason to discontinue living under their own law, in order to live under another. retained therefore their own laws, without adopt-

ing those of the Visigoths.

This is still further confirmed, in proportion as we proceed. The law of Gundebald was extremely impartial, not favouring the Burgundians more than the Romans. It appears by the preamble to that law, that it was made for the Burgundians, and to regulate the disputes which might arise between them and the Romans; and in this last case the judges were equally divided of a fide. This was necessary for particular reasons, drawn from the political regulations of those times †. The Roman law was continued in Burgundy, in order to regulate the disputes of Romans among themfelves. The latter had no inducement to guit their

Lindembroke, at the end of that law, and the different codes of the laws of the barbarians, concerning the privileges of ecclefiaftics in this respect. See also the letter of Charlemagne to his fon Pepin king of Italy, in the year 807, in the edition of Balufius, tome i. page 462, where it is faid, that an ecclefiaflic should receive a triple composition; and the collection of the capitularies, lib. v. art. 302. tome 1. edition of Balufius.

* See that law.

† Of this I shall speak in another place, book xxx. chap. 6, 7, 8, et 9.

own law, as in the country of the Franks; and the rather as the Salic law was not established in Burgundy, as appears by the famous letter which Agobard wrote to Lewis le Debonnaire.

Agobard * defired that prince to establish the Salic law in Burgundy; consequently it had not been established there at that time. Thus the Roman law did, and still does subsist in so many provinces, which formerly depended on this kindom.

The Roman and Gothic laws continued likewise in the country of the establishment of the Goths, where the Salic law was never received. When Pepin and Charles Martel expelled the Saracens, the towns and provinces, which submitted to these princes +, petitioned for a continuance of their own laws. and obtained it: This, in spite of the usages of those times when all laws were personal, soon made the Roman law to be considered as a real and territorial law in those countries.

This appears by the edict of Charles the Bald, given at Pistes in the year 864, which ‡ distinguishes the countries where causes were decided by the Roman law, from where it was otherwise.

The edict of Piftes shews two things; one, that there were countries where causes were decided by the Roman law, and others where they were not; and the other, that those countries where the Ro-

* Agob. opera.

† Catel, hist. of Languedoc, produces to the purpose a chronicle of the year 759. Franci Narbonam obsident, datoque sacramento Gothis, ut si civitatem traderent partibus Pepini, permitterent eos legem suam habere: quo sacto, Gothi Saracenos occiderunt, et civitatem tartibus Pepini reddiderunt.

† In illa terra in qua judicia fecundum legem Romanam terminantur, fecundum ipfam legem judicetur; et in illa terra in qua, &c. Art. 16. See also

att. 20.

man law obtained, were precifely * the fame where it is still followed at this very day, as appears by the same edict. Thus the distinction of the provinces of France, under custom, and those under written law, was already established at the time of the edict of Pistes.

I have observed, that, in the beginning of the monarchy, all laws were personal: And thus when the edict of Pistes distinguishes the countries of the Roman law, from those which were not; the meaning is, that in countries which were not of the Roman law, such a multitude of people had chosen to live under some or other of the laws of the barbarians, that there were scarce any who would live under the Roman law; and that in the countries of the Roman law there were few who would chuse to live under the laws of the barbarians.

I am not ignorant, that what is here advanced will be reckoned new; but if the things I affert be true, furely they are very ancient. After all, what great matter is it, whether they come from me, from the Valefiuses, or from the Bignons?

CHAP. V.

The same subjest continued.

THE law of Gundebald subsisted a long time among the Burgundians, in conjunction with the Roman law: It was still in use under Lewis le Debonnaire, as Agobard's letter plainly evinces. In like manner, though the edict of Pistes calls the country occupied by the Visigoths the country of the Roman law, yet the law of the Visigoths was always in force there; as appears by the synod of Troyes held under Lewis the Stammerer, in the

^{*} See art. 12, et 16. of the edict of Pistes, in Cavilono, in Narbona, &c.

year 878, that is, fourteen years after the edict of Pistes.

In process of time, the Gothic and Burgundian laws fell into disuse, even in their own country; which was owing to those general causes that every where dispelled the personal laws of the barbarians.

CHAP. VI.

How the Roman law kept its ground in the demesne of the Lombards.

EVERY thing gives way now to my principles. The law of the Lombards was impartial, and the Romans were under no temptation to quit their own for it. The motive that prevailed with the Romans under the Franks to make choice of the Salic law, did not take place in Italy; hence the Roman law maintained itself there together with that of the Lombards.

It even fell out, that the latter gave way to the Roman law, and ceased to be the law of the ruling nation; and though it continued to be that of the principal nobility, yet the greatest part of the cities formed themselves into republics, and the nobility mouldered away of themselves, or were destroyed *. The citizens of the new republics had no inclination to adopt a law, which established the custom of judiciary combats, and whose institutions retained much of the customs and usages of chivalry. As the clergy of those days, a clergy even then so powerful in Italy, lived almost all under the Roman law, the number of those who followed the law of the Lombards, must have daily diminished.

^{*} See what Machiavel fays of the ruin of the ancient nobility of Florence.

Besides, the law of the Lombards had not that majesty of the Roman law, which revived to Italy the idea of her universal dominion; neither had it that extent. The law of the Lombards and the Roman law could be then of no other use than to furnish out statutes for those cities that were erected into republics. Now, which could better surnish them, the law of the Lombards that determined on some particular cases, or the Roman law, which embraced them all?

CHAP. VII.

How the Roman law came to be lost in Spain.

THINGS happened otherwise in Spain. The law of the Visigoths prevailed, and the Roman law was loft. Chaindasuinthus * and Recessuinthus + proscribed the Roman laws, and even forbade citing them in their courts of judicature. Recessuinthus was likewise author ‡ of the law which took off the prohibition of marriages between the Goths and Romans. It is evident, that these two laws had the same spirit: This king wanted to remove the principal causes of separation, which substituted between the Goths and the Romans. Now it was thought, that nothing made a wider separation than the prohibition of intermarriages, and the liberty of living under different laws.

But though the kings of the Visigoths had pro-

* He began to reign in the year 642.

† We will no longer be harrassed either by foreign or by the Roman laws. Law of the Visigoths, lib. ii. tit. 1. § 9, et 10.

† Ut tam Gotho Romanam, quam Romano Gotham matrimonio liceat fociari. Law of the Visigoths, lib. iii. tit. 1. chap. 1.

fcribed

ftribed the Roman law, it still subsisted in the demesnes they possessed in South Gaul. These countries being distant from the centre of the monarchy, lived in a state of great independence. We fee from the history of Vamba, who ascended the throne in 672, that the natives of the country were become the prevailing party *. Hence the Roman law had greater authority, and the Gothic less. The Spanish laws neither suited their manners, nor their actual fituation; it was possible too that the people adhered obstinately to the Roman law, because they had annexed to it the idea of liberty. Besides, the laws of Chaindasuinthus, and of Recesfuinthus, contained most severe regulations against the Jews; but these Jews had a vast deal of power in South Gaul. The author of the history of king Vamba calls these provinces the brothel of the Jews. When the Saracens invaded these provinces, it was by invitation; and who could have given it but the Jews or the Romans? The Goths were the first that were oppressed, because they were the ruling We fee in Procopius + that during their calamities they withdrew out of Narbonne Gaul into Spain. Doubtless, under this misfortune, they took refuge in these provinces of Spain, which still held out; and the number of those who in South Gaul lived under the law of the Vifigoths, was thereby greatly diminished.

* The revolt of these provinces was a general defection, as appears by the judgment which is in the sequel of the history. Paulus and his adherents were Romans, they were even favoured by the bishops. Vamba dared not put to death the seditious whom he had conquered. The author of the history calls Narbonne Gaul he nursery of treachery.

† Gothi, qui cladi supersuerant, ex Gallia cum uxoribus liberisque egressi in Hispaniam, ad Teudim jam palam tyrannum se receperunt. De Bello Gotho-

rum, lib. i. cap. 13.

CHAP. VIII.

A false capitulary.

DID not that wretched compiler Benedicius Levita attempt to transform this Visigoth establishment, which prohibited the use of the Roman law, into a capitulary *, ascribed since to Charlemagne? He made of this particular law a general one, as if he intended to exterminate the Roman law throughout the universe.

CHAP. IX.

In what manner the codes of the barbarian laws, and the capitularies came to be lost.

THE Salic, the Ripuarian, Burgundian, and Vifigoth laws, came by degrees to be disused among the French, in the following manner.

As fiefs were become hereditary, and arrierefiefs extended, many usages were introduced, to which these laws were no longer applicable. Their spirit indeed was preserved, which was to regulate most disputes by fines. But as the value of money was, doubtless, subject to change, the fines were also changed; and we see several charters +, where the lords fixed the sines that were payable in their petty courts. Thus the spirit of the law was sollowed without following the law itself.

Besides, as France was divided into a number of petty lordships, which acknowledged rather a feudal than a political dependence, it was very difficult

^{*} Capitularia, I. vi. c. 269. anno 1613, edit. Baluf. p. 1021.

[†] M. de la Thaumassier has collected many of them. See, for instance, chap. 61, 66. and others.

for only one law to be authorifed. In fact, it would be impossible to see it observed. The custom no longer prevailed of sending extraordinary * officers into the provinces, to inspect into the administration of justice, and political affairs; it appears even by the charters, that when new siefs were established, our kings divested themselves of the right of sending those officers. Thus when almost every thing was become a fief, these officers could no longer be employed; there was no longer a common law, because no one could enforce the observance of it.

The Salic, Burgundian, and Vifigoth laws, were therefore extremely neglected at the end of the fecond race, and at the beginning of the third they

were scarce ever mentioned.

Under the first and second race, the nation was often assembled; that is, the lords and bishops; the commons were not yet thought on. In these assemblies attempts were made to regulate the clergy, a body which formed itself, if I may so speak, under the conquerours, and established its prerogatives. The laws made in these assemblies are what we call the Capitularies. Hence four things ensued; the laws of siefs were established, and a great part of the church-revenues was administered by the laws of siefs; the clergy made a wider separation, and neglected † those laws of reformation, where they themselves were not the only reformers; a collection ‡ was made of the canons of councils and

* Missi Dominici.

In the collection of canons, a vast number of the decretals

[†] Let not the bishops, says Charles the Bald, in the capitulary of 844, art. 8. under pretence of the authority of making canons, oppose this constitution, or neglect the observance of it. It seems he already foresaw the fall thereof.

and of the decretals of popes; and these laws the clergy received as coming from a purer source. Ever since the erection of the grand siefs, our kings, as we have already observed, had no longer any deputies in the provinces to enforce the observance of their laws: And hence it is, that under the third race we find no more mention made of capitularies.

CHAP. X.

The same subject continued.

SEVERAL capitularies were added to the law of the Lombards, as well as to the Salic and Bavarian laws. The reason of this has been a matter of inquiry; but it must be sought for in the thing itself. There were several sorts of capitularies. Some had relation to political government, others to economical, most of them to ecclesiastical polity, and some few to civil government. Those of the last species were added to the civil law, that is, to the personal laws of each nation; for which reason it is said in the capitularies, that there is nothing stipulated * therein contrary to the Roman law. In effect, those capitularies regarding economical,

decretals of popes were inserted; there were very sew in the ancient collection. Dionysius Exiguus put a great many into his: But that of Isidorus Mercator was stuffed with genuine and spurious decretals. The old collection was in use in France till Charlemagne. This Prince received from the hands of Pope Adrian I. the collection of Dionysius Exiguus, and caused it to be accepted. The collection of Isidorus Mercator appeared in France about the reign of Charlemagne: People grew passionately fond of it: To this succeeded what we now call the course of canon law.

* See the edict of Pistes, art. 20.

ecclefiaftical, or political government, had no relation to that law; and those concerning civil government had reference only to the laws of the barbarous people, which were explained, amended, enlarged, or abridged. But the adding of thefe capitularies to the personal laws, occasioned, I imagine, the neglect of the very body of the capitularies themselves: In times of ignorance, the abridge ment of a work often causes the loss of the work itfelf. by the fall of fo many laws, cultous

and what they calk . P. A.P. F

Other causes of the disuse of the codes of barbarian laws, as well as of the Roman law, and of the capitularies.

WHEN the German nations fubdued the Roman empire, they learned the use of writing; and, in imitation of the Romans, they wrote down their own usages *, and digested them into codes. The unhappy reigns which followed that of Charlemagne, the invasions of the Normans, and the civil wars, plunged the conquering nations again into the darkness out of which they had emerged : Reading and writing were quite neglected. Hence it is, that in France and Germany the written laws of the barbarians, as well as the Roman law, and the capitularies, fell into oblivion. The use of writing was better preserved in Italy, where reigned the popes and the Greek emperours, where

^{*} This is expressly fet down in some preambles to these codes: We even find in the laws of the Saxons and Frifians different regulations, according to the different districts. To these usages were added some particular regulations, according to the exigency of circumstances; such were the severe laws against the Saxons.

there were flourishing cities, and almost the only commerce that was carried on in those days. To this neighbourhood of Italy it was owing that the Roman law was better preserved in the provinces of Gaul, formerly subject to the Goths and the Burgundians; and so much the more as this law was there a territorial law, and a kind of privilege. It is probable that the disuse of the Visigoth laws in Spain proceeded from the want of writing; and, by the fall of so many laws, customs were every where established.

Personal laws fell to the ground. Compositions, and what they called Freda *, were regulated more by custom than by the text of these laws. Thus, as in the establishment of the monarchy, they had passed from German customs to written laws; some ages after, they came back from written laws to

unwritten customs.

CHAP. XII.

Of local customs. Revolution of the laws of barbarous nations, as well as of the Roman law.

BY feveral monuments it appears that there were local customs, as early as the first and second race. We find mention made of the custom of the place \dagger , of the ancient usage \dagger , of the custom \parallel , of the laws δ , and of the customs. It has been the opinion of some authors, that what went by the name of customs were the laws of the barbarous nations, and what had the appellation of law was

^{*} Of this I shall speak elsewhere.

⁺ Preface to Marculfus's Formulæ.

t Law of the Lombards, book ii. tit. 58. § 3.

[|] Ibid. tit. 41. § 6.

[§] Life of S. Leger.

the Roman law. This cannot possibly be. King Pepin * ordained, that wherever there should happen to be no law, custom should be complied with; but that it should never be preferred to the law. Now, to pretend that the Roman law was preferred to the codes of the laws of the barbarians, is subverting all monuments of antiquity, and especially those codes of barbarian laws that constantly

affirm the contrary.

So far were the laws of the barbarous nations from being those customs, that it was these very laws, as personal institutions, that introduced The Salic law, for instance, was a personal law; but generally, or almost generally, in places inhabited by the Salian Franks, this Salic law, how personal soever, became, in respect to those Salian Franks, a territorial law, and was perfonal only in regard to those Franks that lived eliewhere. Now, if feveral Burgundians, Allemans, or even Romans, should have happened to have frequent difputes, in a place where the Salic law was territorial, they must have been determined by the laws of those people; and a great number of determinations agreeable to fome of those laws must have introduced new customs into the country. This explains extremely well the constitution of Pepin. It was natural that those customs should affect even the Franks, who lived on the fpot, in cases not decided by the Salic law; but it was not natural, that they should prevail over the Salic law itself.

Thus there were in each place an established law, and received customs which served as a supplement

to that law when they did not contradict it.

They might even happen to supply a law that was no way territorial; and to continue the same example, if a Burgundian was judged by the law of his own nation, in a place where the Salic law was

^{*} Law of the Lombards, book ii. tit. 41. § 6.

I i 2 territorial

citly mentioned in the very text of this law, there is no manner of doubt but judgment would have been passed upon him according to the custom of

the place.

In the reign of King Pepin, the customs then established had not the same force as the laws; but it was not long before the laws gave way to the customs. And as new regulations are general remedies that imply a present evil, it may well be imagined, that as early as Pepin's time, they began to prefer the customs to the established laws.

What has been faid fufficiently explains the manner in which the Roman law began so very early to become territorial, as may be feen in the edict of Piftes; and how the Gothic law continued still in force, as appears by the fynod of Troyes * The Roman was become the above-mentioned. general personal law, and the Gothic the particular personal law; consequently the Roman law was territorial. But how came it, some will ask, that the personal laws of the barbarians fell every where into disuse, while the Roman was continued as a territorial law in the Vifigoth and Burgundian provinces? I answer, that even the Roman law had very near the fame fate as the other personal laws: Otherwife we should still have the Theodosian code in those provinces where the Roman law was territorial, whereas we have the laws of Justinian. Those provinces retained scarce any thing more than the name of the country under the Roman or written law, than the natural affection which people have for their laws, especially when they confider them as privileges, and a few regulations of the Roman law which were not yet forgotten. This was however sufficient to produce such an effect, that when Justinian's compilement appeared, it was received in the provinces of the Gothic and

^{*} See chap. 5.

Burgundian demesne as a written law, whereas it was received only as written reason in the ancient demesne of the Franks.

CHAP. XIII.

Difference between the Salic law, or that of the Salian Franks, and that of the Ripuarian Franks, and other barbarous nations.

THE Salic law did not allow of the custom of negative proofs; that is, if a person brought a demand or charge against another, he was obliged by the Salic law to prove it, and it was not fufficient for the accused to deny it; which is agreeable to the laws of almost all the nations in the univerfe.

The law of the Ripuarian Franks had quite a different spirit *; it was contented with negative proofs, and the person against whom a demand or accusation was brought, might clear himself in most cases, by swearing in conjunction with a certain number of witnesses that he had not committed the crime laid to his charge. The number + of witnesses who were obliged to swear, increased in proportion to the importance of the affair; fometimes it amounted to ‡ seventy-two. The laws of the Allemans, Bavarians, Thuringians, Frifians, Saxons, Lombards, and Burgundians, were formed on the same plan as those of the Ripuarians.

l observed, that the Salic law did not allow of

1 Ibid. tit. 11, 12, et 17.

^{*} This relates to what Tacitus fays, that the Germans had common customs, and particular customs.

⁺ Law of the Ripuarians, tit. 6, 7, 8, and others.

negative proofs. There was one * case, however, in which they were allowed; but even then they were not admitted alone, and without the concurrence of politive proofs. The plaintiff + caufed witnesses to be heard, in order to ground his action; the defendant produced also witnesses on his fide; and the judge was to come at the truth by comparing these testimonies ‡. This practice was wastly different from that of the Ripuarian, and other barbarous laws, where it was customary for the party accused to clear himself by swearing he was not guilty, and by making his relations also swear that he had told the truth. These laws could be fuitable only to a people remarkable for their natural fimplicity and candour; we shall fee presently that the legislators were obliged to take proper methods to prevent their being abused.

CHAP. XIV.

Another difference.

THE Salic law did not admit of the trial by combat; though it had been received by the laws of the Ripuarians || and of almost all \(\) the barbarous nations. To me it seems, that the law of combat was a natural consequence, and a remedy of the law which established negative proofs. When an action was brought, and it appeared that

^{*} It was when an accusation was brought against an antrustio, that is, the king's vassal, who was supposed to be possessed of a greater degree of liberty. See tit. 76. of the Pactus legis Salicæ.

[†] See the 76th tit. of the Pactus legis Salicæ. ‡ According to the practice now followed in England.

^{||} Tit. 32. tit. 57. \(\) 2. tit. 59. \(\) 4. \(\) See the following note.

the defendant was going to elude it unjustly by an oath, what other remedy was left to a warlike man *, who saw himself upon the point of being confounded, than to demand satisfaction for the wrong done to him; and even for the attempt of perjury? The Salic law, which did not allow of the custom of negative proofs, neither allowed nor had any need of the trial by combat: But the laws of the Ripuarians + and of the other barbarous nations ‡, who allowed the practice of negative proofs, were obliged to establish the trial by combat.

Whosoever will please to examine the two famous regulations | of Gundebald king of Burgundy concerning this subject, will find they are derived from the very nature of the thing. It was necessary, according to the language of the barbarian laws, to rescue the oath out of the hands of a per-

fon who was going to abuse it.

Among the Lombards, the law of Rotharis admitted of cases, in which a man who had made his defence by oath, should not be suffered to undergo the fatigue of a duel. This custom spread itself

The law of the Frifians, Lombards, Bavarians,

Saxons, Thuringians, and Burgundians,

^{*} This spirit appears in the law of the Ripuarians, tit. 59. § 4. and tit. 67. § 5. and in the capitulary of Louis le Debonnaire, added to the law of the Ripuarians in the year 805. art. 22.

⁺ See that law.

In the law of the Burgundians, tit. 8. § 1, et 2. on criminal affairs; and tit. 45. which extends also to civil affairs. See also the law of the Thuringians, tit. 1. § 31. tit. 7. § 6, and tit. 8.; and the law of the Allemans, tit. 89.; the law of the Bavarians, tit. 8. chap. 2. § 6, and chap. 3. § 1. and tit. 9. chap. 4. § 4.; the law of the Frisians, tit. 11. § 3, and tit. 14. § 4.; the law of the Lombards, book i. tit. 32. § 3. and tit. 35. § 1, and book ii. tit. 35. § 2. further:

further: * we shall see presently the mischies that arose from it, and how they were obliged to return to the ancient practice.

CHAP. XV.

A reflection.

I Do not pretend to deny, but that in the changes made in the code of the barbarian laws, in the regulations added to that code, and in the body of the capitularies, it is possible to find some text, where in fact the trial by combat is not a consequence of the negative proof. Particular circumstances might in the course of many ages give rise to particular laws. I speak only of the general spirit of the laws of the Germans, of their nature and origin; I speak of the ancient customs of those people, that were either hinted at or established by those laws; and this is the only matter in question.

CHAP. XVI.

Of the ordeal or trial by boiling water, established by the Salic law.

THE Salie law † allowed of the ordeal or trial by boiling water; and as this trial was excessively cruel, the law ‡ found an expedient to fosten its rigour. It permitted the person who had been summoned to make the trial with boiling water, to ransom his hand, with the consent of the adverse party. The accuser, for a particular sum deter-

^{*} See chap. xviii. towards the end.

⁺ As also some other laws of the barbarians.

¹ Tit. 56.

mined by the law, might be fatisfied with the oath of a few witnesses, declaring that the accused had not committed the crime. This was a particular case in which the Salic law admitted of the nega-

tive proof.

This trial was a thing privately agreed upon, which the law permitted only, but did not ordain. The law gave a particular indemnity to the accuser, who would allow the accused to make his defence by a negative proof; the plaintiff was at liberty to be fatisfied with the oath of the defendant, as he

was at liberty to forgive him the injury.

The law * contrived a medium, that before fentence passed, both parties, the one through fear of a terrible trial, the other for the sake of a small indemnity, should terminate their disputes, and put an end to their animosities. It is plain, that when once this negative proof was over, nothing more was requisite; and therefore that the practice of legal duels could not be a consequence of this particular regulation of the Salic law.

CHAP. XVII.

Particular notions of our ancestors.

IT is aftonishing that our ancestors should rest the honour, fortune, and life of the subject, on things that depend less on reason than on hazard; and that they should incessantly make use of proofs incapable of convicting, and that had no manner of connection either with innocence or guilt

The Germans, who had never been fubdued +, enjoyed an excessive independence. Different families

* Ibid. tit. 56.

[†] This appears by what Tacitus fays, omnibus idem habitus.

waged war * with each other, to obtain fatisfaction for murder, robberies, or affronts. This custom was moderated by subjecting these hostilities to rules; it was ordained that they should be no longer committed, but by the direction and under the t eye of the magistrate. This was far preferable to a general license of annoying each other.

As the Turks in their civil wars look upon the first victory as a decision of heaven in favour of the victor; so the inhabitants of Germany, in their private quarrels, considered the event of a combat as a decree of providence ever attentive to punish

the criminal or the usurper.

Tacitus informs us, that when one German nation intended to declare war against another, they endeavoured to take some person prisoner whom they obliged to fight with one of their people, and by the event of this combat they judged of the success of the war. A nation who believed that public quarrels could be regulated by a single combat, might very well think that it was proper also for deciding the disputes of individuals.

Gundebald ‡ king of Burgundy was the prince who gave the greatest fanction to the custom of legal duels. The reason he gives for his sanguinary law, is mentioned in his edict. It is, says he, in order to prevent our subjects from attesting by oath what they are not certain of, nay, what they know to be false. Thus while the clergy || declared that an impious law which permitted combats; the Burgundian kings looked upon that as a facrilegious law which authorised the taking of an oath.

* Velleius Paterculus, lib. ii. cap. 118. fays, that the Germans decided all their disputes by the fword.

† See the codes of barbarian laws; and in respect to less ancient times, Beaumanoir on the custom of Beauvoisis.

† Law of the Burgundians, chap: 45.

See the works of Agobard.

The trial by combat had some reason for it founded on experience. In a military nation, cowardice supposes other vices; it is as an argument of a perfon's having refifted the principles of his education, of his being insensible of honour, and of having refused to be directed by those maxims which govern other men; it shows, that he neither fears their contempt, nor fets any value upon their e-Men of any tolerable extraction feldom want either the dexterity requisite to accompany firength, or the strength necessary to concur with courage; because as they set a value upon honour, they are practifed of course in things without which this honour cannot be obtained. Besides, in a military nation, where strength, courage, and prowess are esteemed, crimes really odious are those which arise from imposture, finesse, and cunning, that is, from cowardice.

With regard to the trial by fire, after the party accused had put his hand on a hot iron or in boiling water, they wrapt the hand in a bag and fealed itup; if after three days there appeared no mark, he was acquitted. Is it not plain, that amongst a people inured to the handling of arms, the impreffion made on a rough or callous skin by the hot iron, or by boiling water, could not be fo great as to be feen three days afterwards: And if there appeared any mark, it shewed that the person who had undergone the trial was an effeminate fellow. our peafants handle hot iron with their callous hands as much as they please; and, with regard to the women, the hands of those who worked hard, might be very well able to refift hot iron. The ladies * did not want champions to defend their cause;

^{*} See Beaumanoir, custom of Beauvoisis, chap. 61. See also the law of the Angli, chap. 14. where the trial by boiling water is only a subsidiary proof.

and in a nation where there was no luxury, there was no middle state.

By the law of the † Thuringians a woman accused of adultery was condemned to the trial by boiling water, only when there was no champion to defend her; and the law of the ‡ Ripuarians admits of this trial, only when a person had no witnesses to appear in his justification. Now, a woman, that could not prevail upon any one relation to defend her cause, or a man that could not produce one single witness to attest his honesty, were from those very circumstances sufficiently convicted.

I conclude therefore, that under the circumstances of time in which the trial by combat and the trial by hot iron and boiling water obtained, there was such an agreement between those laws and the manners of the people, that the laws were not so productive of injustice as they were in themselves unjust, that the effects were more innocent than the cause, that they were more contrary to equity than prejudicial to its rights, more unreasonable

than tyrannical.

CHAP. XVIII.

In what manner the custom of judicial combats gained ground.

Franks. But as it is well known from other

[†] Tit. 14. ‡ Chap. 31. § 5. || Si placeret Domino nostro ut cos transferret ad legem Frankorum.

quarters, that the trial by combat prevailed at that time in France, this has been the cause of some perplexity. However, the difficulty may be solved by what I have said; the law of the Salian Franks did not allow of this kind of trial, and that of the Ripuarian Franks & did.

But, notwithstanding the clamours of the clergy, the custom of judicial combats gained ground continually in France; and I shall make it appear prefently that the clergy themselves were in great part

the occasion of it.

It is the law of the Lombards that furnishes us with this proof. There has been long fince a detestable custom introduced, fays the preamble to the conflitution of * Otho II. This is, that if the title to an estate was said to be false, the person who claimed under that title made oath upon the gospel that it was genuine; and without any further judgment he took poffession of the estate: so that they who would perjure themselves, were fure of gaining their The emperor Otho I. having caused himfelf to be crowned at Rome +, at the very time that a council was held there under Pope John XII. all the lords ‡ of Italy represented to the emperor the necessity of enacting a law to reform this horrid a-The Pope and the emperor were of opinion, that the affair should be referred to the council, which was to be fhortly held | at Ravenna. There

† In the year 962.

[§] See this law, tit. 59. § 4. and tit. 67. § 5.

* Law of the Lombards, book 2. tit. 55. chap.

[‡] Ab Italiæ proceribus est proclamatum, ut imperator sanctus, mutata lege, sacinus indignum destrueret. Law of the Lombards, book 2. tit. 55. cap.

It was held in the year 967, in the presence of Pope John XIII. and of the emperor Otho I.

the lords made the same representations, and repeated their instances; but the affair was put off once more under pretence of the absence of particular persons. When Otho II. and Conrad & king of Burgundy arrived in Italy, they had a conference at Verona *, with the Italian lords †; and at their repeated remonstrances, the emperor, with their unanimous confent, made a law, that whenever there happened any disputes about inheritances, and one of the parties infifted upon the legality of his title, and the other maintained its being falfe. the affair should be decided by combat; that the fame rule should be observed in contests relating to fiefs; and that the clergy should be subject to the fame law, but should fight by their champions. Here we fee that the nobility infifted on the trial by combat because of the inconveniency of the proof introduced by the clergy; that, notwithstanding the clamours of the nobility, the notoriousness or the abuse which called out loudly for redrefs, and the authority of Otho who came into Italy to speak and act as master, still the clergy held out in two councils; in fine, that the joint concurrence of the nobility and princes having obliged the clergy to fubmit, the custom of judicial combats must have been confidered as a privilege of the nobility, as a barrier against injustice, and as a security of property, and from that very moment this custom must have gain. ed ground. This was effected at a time when the power of the emperors was great, and that of the popes inconfiderable; at a time when the Otho's came to revive the dignity of the empire in Italy.

I shall make one reslection which will corrobo-§ Otho the Second's uncle, for to Rodolphus, and king of Transjuran Burgundy.

* In the year 988.

+ Cum in hoc ab omnibus imperiales aures pulfarentur. Law of the Lombards, book 2. tit. 55chap. 34. rate what has been above faid, namely, that the custom of negative proofs produced that of judicial combat. The abuse complained of to the Otho's, was, that a person who was charged with having a false title to an estate, defended himself by a negative proof, declaring upon the gospel it was not false. What was it they did to reform this abuse? they revived the custom of judicial combats.

I was in a hurry to speak of the constitution of Otho II. in order to give a clear idea of the disputes between the clergy and the laity of those times. There had been indeed a constitution of * Lotharius I, of an earlier date, who, upon the same complaints and disputes, being desirous of securing the just possession of property, had ordained that the notary should make oath that the deed or title was not forged; and if the notary should happen to die, the witness should be sworn who had signed it. The evil however still continued, till they were obliged at length to have recourse to the remedy above mentioned.

Before that time, I find, that, in the general affemblies held by Charlemagne, the nation represented to him +, that in the actual state of things it was extremely difficult, but that either the accuser or the accused must forswear themselves; and that for this reason it was much better to revive the judicial combat; which was accordingly done.

The usage of judicial combats gained ground among the Burgundians, and that of the oath was limited. Among the Goths the laws of Chaindasuinthus and Recessuinthus left not the least vestige of the trial

† In the law of the Lombards, book. 2. tit. 55. §

23.

^{*}In the law of the Lombards, book 2. tit. 55. § 33. In the copy which Muratori made use of, it is attributed to the emperor Guido.

by combat; this custom had been restrained by the clergy: but in process of time *, those people put a stop to the violence which they had suffered

in this respect.

The first kings of the Lombards gave a check to the † custom of judicial combat. Charlemagne ‡, Lewis le Debonnaire, and the Otho's, made divers general constitutions, which we find inserted in the laws of the Lombards, and added to the Salic laws, whereby the practice of legal duels, at first in criminal and afterwards in civil affairs, obtained a greater extent. They knew not what to do. The negative proof by oath had its inconveniencies, that of legal duels had its inconveniencies also; hence they often changed according as the one or the other affected them most.

On the one hand, the clergy were pleafed to fee, that in all fecular affairs people were obliged to have recourse to the altars | ; and on the other, a haughty nobility were fond of maintaining their

rights by the fword.

* "In palatio quoque, Bera comes Barcinonensis, cum impeteretur a quodam Sunila, & infidelitatis argueretur, cum eodem secundum legem propriam, utpote quia uterque Gothus erat, equestri prœlio congressus est & victus." I cannot recollect where I had this passage from.

† See in the Law of the Lombards, book 1. tit. 4. and tit. 9. § 23. and book 2. tit. 35. § 4. and 5. and tit. 55. § 1. 2. and 3. The regulations of Ro-

tharis: and in § 15. that of Luitprandus.

‡ Ibid. book 2. tit. 55. § 23.

The judicial oaths were made at that time in the churches, and during the first race of our kings there was a chapel set apart in the royal palace, for the affairs that were to be thus decided. See the Formulas of Marculfus, book. 1. chap. 38; the laws of the Ripuarians, tit. 59. § 4. tit. 65. § 5; the history of Gregory of Tours, the capitularly of the year 803, added to the Salic law.

I would

I would not have it inferred, that it was the clergy who introduced the custom fo much complained of by the nobility. This custom was derived from the spirit of the barbarian laws, and from the establishment of negative proofs. But a practice that contributed to the impunity of fuch a number of criminals, having given some people reason to think that it was proper to make use of the fanctity of the churches in order to strike terrour in the guilty, and to intimidate perjurers, the clergy maintained this usage, and the practice that attended it; for in other respects they were absolutely averse to negative proofs. We find in Beaumanoir *, that this kind of proof was never allowed in ecclefiaftic courts; which contributed greatly without doubt to its suppression, and to weaken in this respect the regulation of the codes of the barbarian laws.

This will convince us more strongly of the connection between the usage of negative proofs, and that of judicial combats, of which I have said so much. The lay tribunals admitted of both; and

both were rejected by the ecclefiaftic courts.

In chusing the trial by duel, the nation followed its military spirit; for while the trial by duel was established as a divine decision, the trials by the cross, by cold or boiling water, which had been also guarded as divine decisions, were abolished.

Charlemagne ordained, that if any differences should arise between his children, they should be terminated by the judgment of the cross. Lewis le Debonnaire †, confined this judgement to eccle-

* Chap. 38. pag. 212.

[†] We find his constitutions inserted in the law of the Lombards, and at the end of the Salic laws.

tiastic affairs; his fon Lotharius abolished it in all cases; nay he abolished + even the trial by coldwater.

I do not pretend to fay that at a time when fo few usages were universally received, these trials were not revived in some churches; especially as they are mentioned in a charter ‡ of Philip Augustus: But I affirm they were very little used. Beaumanoir ||, who lived at the time of St. Lewis, and a little after, enumerating the different kinds of trials, mentions that of judicial combat, but not a word of the others.

CHAP. XIX.

A new reason for the disuse of the Salic and Roman laws, as also of the capitularies.

Have already mentioned the reasons that occafioned the disuse of the Salic and Roman laws, as also of the capitularies; here I shall add, that the principal cause was the great extent given to judiciary combats.

As the Salic laws did not admit of this custom, they became in some measure useless, and fell into oblivion. In like manner the Roman laws, which also rejected this custom, were laid aside, their whole attention was then taken up in establishing the law of judicial combats, and in forming a proper digest of the several cases that might happen on those occasions. The regulations of the capitularies became also of no manner of service. Thus it is that such a number of laws lost all their authority, without our being able to tell the precise time it was lost; they fell into oblivion, and we

[†] In a constitution inserted in the law of the Lombards, book. 2. tit. 55. § 21.

[‡] In the year 1200.

[|] Custom of Beauvoisis, chap. 39.

cannot find any others that were substituted in their place.

Such a nation had no need of written laws; hence its written laws might very eafily fall into

difuse.

If there happened to be any disputes between two parties, they had only to order a single combat. For this no great knowledge or abilities were

requifite.

All civil and criminal actions are reduced to facts. It is upon these facts they fought; and not only the substance of the affair, but likewise the incidents and imparities were decided by combat, as Beaumanoir * observes, who produces several instances.

I find that, towards the commencement of the third race, the jurisprudence of those times related entirely to personal quarrels, and was governed by the point of honour. If the judge was not obeyed, he insisted upon satisfaction from the person that had contemned his authority. At Bourges, if † the provost had summoned a person, and he resused to come, his way of proceeding was to tell him, I sent for thee, and thou didst not think it worth thy while to come; I demand therefore satisfaction for this contempt. Upon which they fought. Lewis the Fat resormed this custom ‡.

The custom of legal duels prevailed | at Orleans, even in all demands of debt. Lewis the Young declared, that this custom should take place only when the demand exceeded five sous. This ordinance was a local law; for in St. Lewis's time § it

^{*} Chap. 61. page 309, and 310.

[†] Charter of Lewis the Fat, in the year 1145, in the collection of ordinances. ‡ Ibid.

Charter of Lewis the Young, in the year 1168, in the collection of ordinances.

[§] See Beaumanoir, chap. 63. page 325.

was fufficient that the value was more than twelve deniers. Beaumanoir ‡ heard a gentleman of the law affirm, that formerly there had been a bad cuftom in France, of hiring a champion for a certain time to fight their battles in all causes. This shews, that the uses of judiciary combats must have had at that time a prodigious extent.

CHAP. XX.

Origin of the point of honour.

WE meet with inexplicable enigmas in the codes of the laws of the barbarians. The law of the Frifians allows only half a fou in composition to a person that had been beaten with a stick; and yet for ever fo fmall a wound it allows more. By the Salic law, if a freeman gave three blows with a flick to another freeman, he paid three fous; if he drew blood, he was punished as if he had wounded him with steel, and he paid fifteen fous: thus the punishment was proportioned to the greatness of the wound. The law of the Lombards & established different compositions for one, two, three, four blows; and fo on. At prefent a fingle blow is equivalent to a hundred thousand.

The constitution of Charlemagne inserted in the law * of the Lombards, ordains, that those who were allowed the trial by combat, should fight with batoons. Perhaps this was out of regard to the clergy; or probably, as the usage of legal duels gained ground, they wanted to render them less

[†] See the custom of Beauvoisis, chap. 28. page

Additio fapientum Willemari, tit. 5.

[§] Book 1. tit. 6. § 3, * Book 2. tit. 5. § 23.

fanguinary. The capitulary * of Lewis le Debonnaire allows the liberty of chusing to fight either with the sword or batoon. In process of time none but bondmen fought with the batoon †.

Here I fee the first rife and formation of the particular articles of our point of honour. The accuser began with declaring in the presence of the judge, that such a person had committed such an action; and the accused made answer, that he lied †; upon which the judge gave orders for the duel. It became then an established rule, that whenever a person had the lie given him, it was incumbent on him to sight.

Upon a man's ‡ declaring he would fight, he could not afterward; depart from his word; if he did, he was condemned to a penalty. Hence this rule enfued, that whenever a person had engaged

his word, honour forbade him to recall it.

Gentlemen | fought one another on horseback, and armed at all points; villains § fought on foot and with batoons. Hence it followed, that the batoon was looked upon as the instrument of insults and affronts; ** because to strike a man with it, was treating him like a villain.

None but villains fought with their †† faces un-

* Added to the Salic law, in 819.

+ See Beaumanoir, chap. 64. page 328. + Ibid.

‡ See Beaumanoir, chap. 3. pages 25, and 329.

See in regard to the arms of the combatants, Beaumanoir, chap. 61. page 308. and chap. 64. page 328.

§ Ibid. chap. 64. page 328. See also the charters of St. Austin of Anjou, quoted by Galland,

page 263.

** Among the Romansit was not infamous to be beaten with a ltick, leg. Isus fustium, de iis qui notantur infamia

†† They had only the batoon and buckler. Beauma-noir, chap. 64. page 328.

covered; fo that none but they could receive a blow on the face. Therefore a box on the ear became an injury that must be expiated with blood, because the person who received it had been treated as a villain.

The several people of Germany were no less sensible than we, of the point of honour; nay, they were more so. Thus the most distant relations took a very considerable share to themselves in every affront, and on this all their codes are founded. The law ‡ of the Lombards ordains, that whosoever goes attended with servants to beat a man by surprise, in order to load him thereby with shame, and to render him ridiculous, should pay half the composition which he would owe if he had killed him §; and if through the same motive he tied or bound him, he should pay three quarters of the same composition.

Let us then conclude, that our forefathers were extremely sensible of affronts: but that affronts of a particular kind, such as being struck with a certain instrument on a certain part of the body, and in a certain manner, were as yet unknown to them. All this was included in the affront of being beaten; and, in this case, the proportion of the excess con-

stituted the greatness of the outrage.

CHAP. XXI.

A new reflection upon the point of honour among the Germans.

IT was a great infamy, fays Tacitus *, among the Germans, for a person to leave his buckler behind

[‡] Book 1. tit. 6. § 1. § Book 1. tit. 6. § 2.

^{*} De moribus Germanorum.

him in battle; for which reason a great many, after a misfortune of this kind, have destroyed themjelves. Thus the ancient Salic law † allows a composition of sisteen sous to any person that had been
injuriously reproached with having lest his buckler
behind him.

When Charlemagne | amended the Salic law, he allowed in this case no more than three sous in composition. As this prince cannot be suspected of having had a design to enervate the military discipline, it is manifest that this change was owing to that of the arms, and that from this change of arms a great number of usages derive their origin.

CHAP. XXII.

Of the manners relative to judicial combats.

OUR connection with the fair fex is founded on the happiness attending the pleasure of enjoyment; on the charms of loving and being beloved; and likewise on the desire of pleasing the ladies, because they are most penetrating judges in respect to part of those things which constitute personal merit. This general desire of pleasing produces gallantry, which is not indeed love itself, but the delicate, the volatile, the perpetual dissembler of love.

According to the different circumstances of every country and age, love inclines more to one of those three things, than to the other two. Now, I maintain, that the prevailing spirit, at the time of our judicial combats, must naturally have been that of gallantry.

f In the Pactus legis Salica.

We have both the ancient law and that which was amended by this prince.

I find in the law of the Lombards ‡, that if one of the two champions was found to have any herbs fit for enchantment about him, the judge ordered them to be taken from him, and obliged him to swear he had no more. This law could be founded only on the vulgar opinion; it was fear (which has been faid to have invented so many things) that made them imagine this kind of pressiges. As in the single combats, the champions were armed at all points; and as with heavy arms, both of the offensive and defensive kind, those of particular temper and force were of infinite advantage; the notion of some champions having inchanted arms, must certainly have turned the brains of a great many people.

Hence arose the marvellous system of chivalry. The minds of all forts of people quickly imbibed these extravagant ideas. Then it was that in romances they beheld knights-errant, necromancers, fairies, winged or intelligent horses, invisible or invulnerable men, magicians who concerned themselves in the birth and education of great personages, inchanted and disinchanted palaces, a new world in the midst of the old one, and the ordinary course of nature left only to the lower class

of mankind.

Knights-errant always in armour, in a part of the world full of castles, forts, and robbers, found honour in punishing injustice, and in protecting weakness. Hence our romances abound with gallantry founded on the idea of love, joined with that of strength and protection.

Such was the original of gallantry, when they formed to their imaginations an extraordinary fer of men, who at the fight of virtue, joined with beauty and diffrefs, were inclined to expose them-

selves to all hazards for their sake, and to endeayour to please them in the common actions of life.

Our romances of chivalry flattered this defire of pleafing, and communicated to a part of Europe that spirit of gallantry, which we may venture to affirm was very little known to the ancients.

The prodigious luxury of that immense city Rome, flattered the idea of sensible pleasures. A certain notion of tranquillity in the fields of Greece gave rise to the description # of soft and amorous sentiments. The idea of knights errant, protectors of the virtue and beauty of the Fair sex, led people to that of gallantry.

This spirit was continued by the custom of tournaments, which, uniting the rights of valour and love, added still a great importance to gallan-

try.

CHAP. XXIII.

Of the code of laws on judicial combats.

Some perhaps will have a curiofity to fee this monstrous custom of judiciary combat reduced to principle, and to find a code of such extraordinary laws. Men, reasonable, in the main, reduce their very prejudices to rule. Nothing was more contrary to good sense, than those combats: and yet when once this point was laid down, a kind of prudential management was used in carrying it into execution.

In order to be thoroughly acquainted with the juriforudence of those times, it is necessary to read with attention the regulations of St. Lewis, who

See the Greek romances of the middle age, Vol. II. M m made made such great changes in the judiciary order. Defontaines was contemporary with that prince: Beaumanoir, wrote after § him; and the rest lived fince his time. We must therefore look for the ancient practice in the amendments that have been made of it.

CHAP. XXIV.

Rules established in the judicial combat.

When there happened * to be several accusers, they were obliged to agree among themselves that the action might be carried on by a single prosecutor; and if they could not agree, the person before whom the action was brought, appointed

one of them to profecute the quarrel.

When † a gentleman challenged a villain, he was obliged to present himself on foot with buckler and batoon; but if he came on horseback, and armed like a gentleman, they took his horse and his arms from him; and stripping him to his shirt, they obliged him to fight in that condition with the villain.

Before the combat the † magistrates ordered three banns to be published. By the first the relations of the parties were commanded to retire; by the second the people were warned to be filent; and the third prohibited the giving any affistance to either of the parties, under severe penalties; nay, even on the pain of death, if by this affistance either of the combatants should happen to be vanquished.

The officers belonging to the civil magistrate | guarded the list or inclosure where the battle was

§ In the year 1283.

+ Ibid. chap. 64. page 328.

‡ Ibid, page 330. | Ibid.

^{*} Beaumanoir, chap. 6. page 40. and 41.

fought; and in case either of the parties declared himself desirous of peace, they took particular norice of the actual state in which things stood at that very moment, to the end that they might be restored to the same situation, in case they did not

come to an accommodation 6.

When the pledges were received either for a crime or for false judgement, the parties could not make up the matter without the confent of the lord: and when one of the parties was overcome, there could be no accommodation without the permission of the count *, which had some analogy to our letters of grace.

But if it happened to be a capital crime, and the lord, corrupted by presents, consented to an accommodation, he was obliged to pay a fine of fixty livres, and the right + he had of punishing the ma-

lefactor who devolved to the count.

There were a great many people incapable either of offering, or of accepting battle. But liberty was given them in trial of the cause to chuse a champion; and that he might have a stronger interest in defending the party in whose behalf he appeared, his hand was cut off if he loft the battle t.

When capital laws were made in the last century against duels, perhaps it would have been sufficient to have deprived a warrior of his military capacity,

& Ibid.

* The great vassals had particular privileges.

+ Beaumanoir, chap. 64. p. 330. fays he lost his jurisdiction: these words, in the authors of those days, have not a general fignification, but a fignification limited to the affair in question. Defontaines, chap. 21.

This custom, which we meet with in the capitularies, was still subsisting at the time of Beaumanoir.

See chap. 61. p. 315.

by the loss of his hand; nothing in general being a greater mortification to mankind than to survive the loss of their character.

When || in capital cases the duel was fought by champions, the parties were placed where they could not behold the battle; each was bound with the cord that was to be used at his execution, in case his champion was overcome.

The person that succumbed in battle, did not always lose the point contested; if, for instance 6, they fought on imparlance, he lost only the im-

parlance.

CHAP. XXV.

Of the bounds prescribed to the custom of judicial combats.

When pledges of battle had been received upon a civil affair of small importance, the lord o-

bliged the parties to withdraw them.

If a fact was notorious *, for instance, if a man had been affassinated in the open marked-place, then there was neither a trial by withesses, nor by combat; the judge gave his decision from the no-

toricty of the fact.

When the court of a lord had often determined after the fame manner, and the ufage was thus known +, the lord refused to grant the parties the privilege of duelling, to the end that the usages might not be altered by the different events of the combats.

Beaumanoir, chap. 64. p. 330.

§ Ibid. chap. 61. p. 309.

* Beaumanoir, chap, 61. p. 351. Ibid. chap. 43. p. 230.

† Beaumonoir, chap. 61. p. 300. See also Desontaines, chap. 22. art 24.

They

They were not allowed to infift upon duelling but for + themselves, for some one belonging to their family, or for their liege lord.

When the accused had been acquitted ‡, another relation could not insist on fighting him; o-

therwise disputes would never be terminated.

If a person appeared again in public, whose relations, upon a supposition of his being murthered, wanted to avenge his death; there was then no room for a combat: the same may be said || if by a notorious absence the fact was proved to be im-

possible.

If a man * who had been mortally wounded, had disculpated before his death the person accused, and named another, they did not proceed to a duel: but if he had mentioned nobody, his declaration was looked upon only as a forgiveness on his death-bed; the prosecution was continued, and even among gentlemen they could make war against each other.

When there was a war, and one of the relations had given or received pledges of battle, the right of war ceased; for then it was thought that the parties wanted to pursue the ordinary course of justice, wherefore he that continued the war would

have been fentenced to repair all damages.

Thus the practice of judiciary combat had this advantage, that it was apt to change a general into a particular quarrel, to reftore the courts of judicature to their authority, and to reduce to a civil state those who were no longer governed but by the law of nations.

As there are an infinite number of wife things that are managed in a very foolish manner; so there are many foolish things that are very wisely conducted.

† Beaumanoir, chap. 63. p. 322.

[‡] Ibid. || Ibid.

When a man *, who was challenged for a crime, wishby shewed that it had been committed by the appellant himself, there could be then no pledges of battle: for there is no criminal but would prefer a duel of uncertain event to a certain punishment.

There were no duels † in affairs decided by arbiters, or by ecclefiaftic courts; nor in cases relating

to womens doweries.

A woman, fays Beaumanoir, cannot fight. If a woman appealed a person without naming her champion, the pledges of battle were not accepted. It was also requisite that a woman should be authorised ‡ by her baron, that is, by her husband, to appeal; but she might be appealed without this authority.

If either the appellant || or the appellee were under fifteen years of age, there could be no combat. They might order it indeed in disputes relating to orphans, when their guardians or trustees were

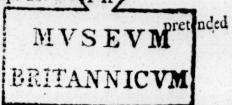
willing to run the rifk of this procedure.

The cases in which a bondman was allowed to fight, are, I think, as follow. He was allowed to fight another bondman; he was allowed to fight a free-man, or even a gentleman, in case they were appellants; but if he was the appellant * himself, the other might refuse to fight; and even the bondman's lord had a right to take him out of the court. The bondman might, by his lord's charter +, or by usage, fight with any freeman; and the church

* Beaumanoir, chap. 63. p. 324.

† Ibid. p. 325. || Ibid. p. 323. See also what I have faid in the 18th book.

* Beaumanoir, chap. 63. p. 322. † Defontaines, chap. 22. art FH



pretended ‡ to this right for her bondmen, as a mark of respect | due to her by the laity.

C H A P. XXVI.

Of the judiciary combat between one of the parties, and one of the witnesses.

BEaumanoir informs us * that a person who saw a witness going to swear against him, might elude the second, by telling the judges, that his adversary produced a false and slandering witness; and if the witness was willing to maintain the quarrel, he gave pledges of battle. They troubled themselves no surther about the inquest; for if the witness was overcome, it was decided, that the party had produced a false witness, and he lost his cause.

It was necessary the second witness should be prevented from swearing; for if he had made his attestation, the affair would have been decided by the deposition of two witnesses. But by staying the second, the deposition of the first witness was of no manner of use.

The fecond witness being thus rejected, the party was not allowed to produce any others, but he lost his cause; in case however there had been no pledges of battle, he might produce other witnesses.

Beaumanoir observes, † that the witness might say to the party he appeared for, before he made his deposition: I do not care to fight for your quarrel, nor to enter into any debate; but if you are wil-

[‡] Habeant bellandi et testificandi licentiam. Chariter of Louis the Fat, in the year 1118.

Ibid.

^{*} Chap. 61. p. 315.

[†] Chap. 6. p. 39. and 40.

ling to fland by me, I am ready to tell the truth. The party was then obliged to fight for the witness, and if he happened to be overcome, he did not lose his cause *, but the witness was rejected.

This, I believe, was a limitation of the ancient custom; and what makes me think so, is, that we find this usage of appealing the witnesses, established in the laws of the + Bavarians and ‡ Burgundi.

ans, without any restriction. I have already made mention of the conflitution of Gundebald, against which Agobard | and St. Avitus & made fuch loud complaints. " When " the accused (fays this prince) produces witnesses " to swear that he has not committed the crime, "the accuser may challenge one of the witnesses " to a combat; for it is very just that the person " who has offered to fwear, and has declared that " he was certain of the truth, should make no dif-" ficulty to maintain it." Thus the witnesses were deprived by this king of every kind of fubterfuge to avoid the judiciary combat.

CHAP. XXVII.

Of the judicial combat between one of the parties, and one of the lord's peers. Appeal of false judge. ment.

A S the nature of judicial combats was to terminate the affair for ever, and was incompatible with 4 a new judgment and new profecutions; an

- * But if the battle was fought by champions, the champion that was overcome had his hand cut off.
 - † Tit. 16. § 2.

† Tit. 45.

Letter to Lewis le Debonnaire.

Life of St. Avitus.

4 Beaumanoir, chap. 2. p. 22.

appeal, fuch as is established by the Roman and Canon laws, that is, to a superiour court, in order to rejudge the proceeding of an inferiour court, was a thing unknown in France.

This is a form of proceeding to which a warlike nation entirely governed by the point of honour, was quite a stranger; and agreeably to this very spirit the same methods * were used against the

judges, as were allowed against the parties.

An appeal among the people of this nation was a challenge to fight with arms, a challenge decided by blood, and not by an invitation to a paper quarrel, the knowledge of which was deferred to fuc-

ceeding ages +.

Thus St. Louis in his Inftitutions fays, that an appeal includes both felony and iniquity. Thus Beaumanoir tells us, that if a vaffal ‡ wanted to make his complaint of any outrage committed against him by his lord, he was first obliged to denounce that he quitted his fief; after which he appealed before his lord paramount, and offered pledges of battle. In like manner the lord renounced the homage of his vaffal, if he appealed him before the count.

A vaffal to appeal his lord of false judgment, was telling him that his sentence was unjust and malicious: Now, to utter such words against his lord, was in some measure committing the crime of

felony.

Hence, instead of bringing an appeal of false judgment against the lord, who established and directed the court, they appealed the peers of whom the court itself was formed: By this means they

^{*} Beaumanoir, chap. 61. page 312. et chap. 67. page 338.

[†] Book ii. chap. 15.

[†] Beaumanoir, chap. 61. page 310, and 311. and chap. 67. page 337.
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avoided the crime of felony; for they insulted on. ly their peers, with whom they could always account for the insult.

It was a very * dangerous thing to appeal to the peers of false judgement. If the party waited till judgement was pronounced, he was obliged to fight them all †, when they offered to make good their judgement. If the appeal was made before all the judges had given their opinion, he was obliged to fightall those who had agreed in their judgement. In order to avoid this danger, it was usual to petition the lord ‡ to give orders that each peer should give his opinion out loud; and when the first had pronounced, and the second was going to do the same, the party told him that he was a liar, a knave, and a slanderer, and then he had to fight only with that peer.

Defontaines | would have it, that before an appeal was made of false judgement, it was customary to let three judges pronounce; and he does not say that it was necessary to sight them all three, and much less that there was any obligation to sight all those who had declared themselves of the same opinion. These differences arise from this, that there were very sew usages exactly in all parts the same. Beaumanoir gives an account of what passed in the county of Clermont; and Desontaines of what was

practifed in Vermandois.

When § one of the peers had declared that he would maintain the judgement, the judge ordered pledges of battle to be given, and likewise took security of the appellant that he would maintain his appeal. But the peer who was appealed gave no

† Ibid. page 314. ‡ Ibid.

^{*} Beaumanoir, chap. 61. page 313.

Chap. 22. art. 1, 10, and 11. he fays only that each of them was allowed a fmall fine.

[§] Beaumanoir, chap. 61. page 314.

fecurity, because he was the lord's vasfal, and was obliged to defend the appeal, or to pay the lord a

fine of fixty livres.

If the * appellant did not prove that the judgement was false, he paid the lord a fine of fixty livres, the same fine to † the peer whom he had appealed, and as much to every one of those who had openly consented to the judgement.

When a person violently suspected of a capital crime, had been taken and condemned, he could make no appeal ‡ of false judgement: For he would always appeal, either to prolong his life, or to get

an absolute discharge.

If a person | said that the judgement was saise and bad, and did not offer to make his words good, that is, to fight, he was condemned to a fine of fix sous if a gentleman, and to five sous if a bondman, for the injurious expressions he had uttered.

The judge or peers § who were overcome, forfeited neither life nor limbs; but the person who appealed them was punished with death, if it hap-

pened to be a capital crime +.

This manner of appealing the peers of false judgement, was to avoid appealing the lord himself. But if + the lord had no peers, or had not a suffi-

* Beaumanoir, chap. 67. page 336, and 337. Defontaines, chap. 22. art. 9.

† Defontaines, ib.

Beaumanoir, chap. 61. page 316.

1 Ib. page 314. Defontaines, chap. 22. art. 21.

§ Ib. art. 7.

4 See Defontaines, chap. 21. art. 11, and 12. and following, who distinguishes the causes in which the appellant of false judgment loses his life, the point contested, or only the imparlance.

+ Beaumanoir, chap. 62. page 322. Defontaines,

chap. 22. art 3.

cient number, he might at his own expence hire *
peers of his lord paramount; but these peers were
not obliged to judge if they did not like it; they
might declare that they were come only to give
their opinion: In that particular † case, the lord
himself pronounced sentence as judge; and if an
appeal of salse judgment was made against him, it
was his business to stand the appeal.

If the lord happened ‡ to be so very poor as not to be able to hire peers of his paramount, or if he neglected to ask for them, or the paramount refufed to give them, then as the lord could not judge by himself, and as nobody was obliged to plead before a tribunal where judgment could not be given, the affair was brought before the lord paramount.

This, I believe, was one of the principal causes of the separation between the jurisdiction and the sief, from whence arose that maxim of the French lawyers, The sief is one thing, and the jurisdiction another. For as there were a vast number of peers who had no subordinate vassals under them, they were incapable of holding their court; all assairs were then brought before the lord paramount, and they lost the privilege of judging, because they had neither power nor will to claim it.

All the peers | who had agreed to the judgement, were obliged to be present when it was pronounced, that they might follow one another, and say Yes to the person, who, wanting to make an appeal of false judgment, asked them whether they followed; for Desontaines says §, that it is an af-

* The Count was not obliged to lend any. Beaumanoir, chap. 67. page 337.

† Nobody can pass judgment in his court, says Beaumanoir, chap. 67. page 336, and 337.

‡ Beaumanoir, chap. 62. pag. 322.

Defontaines, chap. 21. art. 27, and 28.

§ Ibid. art. 28.

fair of courtefy and loyalty, and there is no such thing as evasion or delay. From hence, I imagine, arose the custom still followed in England, of obliging the jury to be all unanimous in their verdict in cases relating to life and death.

Judgement was therefore given according to the opinion of the majority: And if there was an equal division, sentence was pronounced, in criminal cafes, in favour of the accused; in cases of debt, in favour of the debtor; and in cases of inheritance,

in favour of the defendant.

Defontaines observes *, that a peer could not excuse himself by saying, that he would not sit in court if there were only four †, or if the whole number, or at least the wisest part, were not present. This is just as if he was to say in the heat of an engagement, that he would not affish his lord, because he had not all his vassals with him. But it was the lord's business to cause his court to be respected, and to chuse the bravest and most knowing of his tenants. This I mention in order to shew the duty of vassals, which was to sight and to judge; and such indeed was this duty, that to judge was all the same as to sight.

It was lawful for a lord who went to law with his vaffal in his own court, and was cast, to appeal one of his tenants of false judgement. But as the latter owed a respect to his lord for the fealty he had vowed, and the lord on the other hand owed benevolence to his vassal for the fealty accepted; hence it was customary to make a distinction between the Lord's affirming in general, that the judgement I was false and unjust, and imputing per-

* Chap. 21. art. 37.

[†] This number at least was necessary. Defontaines, chap. 21. art. 36.

[‡] Beaumanoir, chap. 67. page 337.

fonal * prevarications to his tenant. In the first case, he affronted his own court, and in some measure himself, so that there was no room for pledges of battle. But there was room in the second, because he attacked his vassal's honour; and the person overcome was deprived of life and property, in order to maintain the public tranquillity.

This distinction which was necessary in that particular case, had afterwards a greater extent. Beaumanoir fays, that when the appellant of false judgement attacked one of the peers by perfonal imputations, then battle enfued; but if he attacked only the judgment, the peer appealed was at liberty + to determine the dispute either by battle or by law. But as the prevailing spirit in Beaumanoir's time was to restrain the usage of judicial combats, and as this liberty which had been granted to the peer appealed, of defending the judgment by combat or not, is equally contrary to the ideas of honour established in those days, and to the obligation the vaffal lay under of defending his lord's jurifdiction; I am apt to think that this distinction of Beaumanoir's was owing to a new regulation among the French.

I would not have it thought, that all appeals of false judgement were decided by battle: It fared with this appeal as with all others. The reader may recollect the exceptions mentioned in the 25th chapter. Here it was the business of the superiour court to examine whether it was proper to withdraw the pledges of battle or not.

There could be no appeal of false judgment against the king's court; because as there was no one equal to the king, no one could appeal him; and as the king had no superiour, none could

appeal from his court.

+ Ib. page 337, and 338.

^{*} Beaumanoir, chap. 67. page 337.

This fundamental regulation, which was necesfary as a political law, diminished also as a civil law the abuses of the judicial proceedings of those times. When a lord was afraid * that his court would be appealed of false judgement, or perceived that they were determined to appeal; if justice required there should be no appeal, he might petition for peers from the king's court, who could not be appealed of false judgment. Thus King Philip, says Desontaines +, sent his whole counsel to judge an affair in the court of the abbot of Corbey.

If the lord could not have judges from the king, he might remove his court into the king's, if he held immediately of him: But if there were intermediate lords, he had recourse to his paramount, going from one lord to another, till he came to the

fovereign.

Thus notwithstanding they had not in those days neither the practice nor even the idea of our modern appeals, yet they had recourse to the king, who was the source from whence all those rivers slowed, and the sea into which they returned.

CHAP. XXVIII.

Of the appeal of default of justice.

THE appeal of default of justice was when the court of a particular lord deferred, evaded,

or refused to do justice to the parties.

During the time of our princes of the fecond race, though the count had feveral officers under him, their person was subordinate, but not their jurisdiction. These officers in their court-days,

^{*} Defontaines, chap. 22. art. 14. † Ibid.

affizes, or placita, gave judgement in the last resort as the count himself; all the difference consisted in the division of the jurisdiction. For instance, the count had * the power of condemning to death, of judging of liberty and of the restitution of goods, which the centenarii had not.

For the same reason, there were higher causes † reserved to the king; namely, those which directly concerned the political order of the state. Such were the disputes between bishops, abbots, counts, and other grandees, whom the kings judged toge-

ther with the great vaffals t.

What some authors have advanced, namely, that an appeal lay from the count to the king's commissary, or missus dominicus, is not well grounded. The count and the missus had an equal jurisdiction independent of each other: The whole difference was s, that the missus held his placita or assizes four months in the year, and the count the other eight.

If a person who had been condemned at an affize 4, demanded to have his cause tried over again, and was afterwards cast, he paid a fine of sisteen sous, or received sisteen blows from the judges who

had decided the affair.

When the counts or the king's commissaries did not find themselves able to bring the great lords to

* Third capitulary of the year 812. art. 3. edition of Balufius, p. 497. and of Charles the Bald, added to the law of the Lombards, book ii. art. 3.

+ Ib. art. 2. edit. of Baluf. page 497.

† Cum fidelibus. Capitulary of Lewis le Debonnaire, edition of Balufius, page 667.

| See the capitulary of Charles the Bald, added to

the law of the Lombards, book ii. art. 3.

§ Third capitulary of the year 812. art. 8.

1 Placitum.

reason,

reason, they made them give bail or security *, that they would appear in the king's court: This was to try the cause, and not to rejudge it. I find in the capitulary of Metz +, a law, by which the appeal of false judgment to the king's court is established, and all other kinds of appeal proscribed and punished.

If they refused to submit to the judgment of the sheriffs; and made no complaint, they were imprisoned till they had submitted: But if they complained, they were conducted under a proper guard before the king, and the affair was examined in

his court.

Their could be hardly any room then for an appeal of default of justice. For so far was it from being usual in those days to complain, that the counts and others, who had a right of holding assizes, were not exact in discharging this duty; that ||, on the contrary, it was a general complaint that they were too exact. Hence we find such numbers of ordinances, by which the counts, and all other officers of justice whatsoever, are forbid to hold their assizes above thrice a-year. It was not so necessary to chastise their indolence, as to theck their activity.

But, after an innumerable multitude of petty lordships had been formed, and different degrees of vassalage established, the neglect of certain vassals in holding their courts gave rise to this kind of ap-

* This appears by the formulas, chartres, and the

capitularies.

The officers under the count Scabini.

See the law of the Lombards, book ii. tit. 52. art. 22.

[†] In the year 757, edition of Balusius, page 180. art. 9, & 10. and the synod apud Vernas in the year 755, art. 29. edition of Balusius, page 175. These two capitularies were made under king Pepin.

peal *; especially as very considerable profits accrued to the lord paramount from the several tines.

As the custom of judicial combats gained every day more ground, there were places, cases, and times, in which it was difficult to affemble the peers, and consequently in which justice was delayed. The appeal of default of justice was therefore introduced, an appeal that has been often a remarkable æra in our history; because most of the wars of those days were imputed to a violation of the political law; as the case, or at least the pretence of our modern wars, is the infringement of the law of nations.

Beaumanoir † fays, that in the case of default of justice, battle was not allowed. The reasons are these: 1. They could not challenge the lord, because of the respect due to his person; neither could they challenge the lord's peers, because the case was clear, and they had only to reckon the days of the summons, or of the other delays; there had been no judgment passed, consequently there could be no appeal of salse judgment: In sine, the crime of the peers offended the lord as well as the party, and it was against rule that there should be battle between the lord and his peers.

But ‡ as the default was proved by witnesses before the superiour court; the witnesses might be challenged, and then neither the lord nor his court

were offended.

In case the default was owing to the lord's tenants or peers by deferring justice, or by evading judgment after past delays, then these peers were appealed of default of justice before the para-

† Chap. 61. page 315.

^{*} There are instances of appeals of default of justice as early as the time of Philip Augustus.

[#] Beaumanoir, chap. 61. page 315.

mount; and if they were cast, they * paid a fine to their lord. The letter could not give them any affistance; on the contrary, he seized their sief till

they had each paid a fine of fixty livres.

2. When the default was owing to the lord, which was the case whenever there happened not to be a sufficient number of peers in his court to pass judgment, or when he had not assembled his tenants, or appointed somebody in his room to assemble them, an appeal might be made of the default before the lord paramount; but then the party + and not the lord was summoned, because of the respect due to the latter.

The lord demanded to be tried before the paramount, and if he was acquitted of the default, the cause was remanded to him, and he was likewise paid a fine of ‡ fixty livres. But if the default was proved, the penalty || inflicted on him was to lose the judgment of the cause, which was to be then tried in the superiour court. In fact, the complaint of default was made with no other view.

3. If the lord was fued § in his own court, which never happened but upon disputes relating to the fief; after letting all the delays pass, the lord himfelf + was summoned before the peers in the sove-

* Defontaines, chap. 21. art. 24.

† Ibid. art. 31.

Beaumanoir, chap. 61. page 312.

Defoataines, chap. 21. art. 29.

§ This was the case in the samous difference between the lord of Nelle and Joan Countess of Flanders, under the reign of Lewis VIII. He sued her in her own court of Flanders, and summoned her to give judgment within forty days, and afterwards appealed in default of justice to the king's court. She answered, he should be judged by his peers in Flanders. The king's court determined that he should not be remanded, and that the countess should be summoned.

+ Beaumanoir, chap. 34.

reign's name, whose permission was necessary on that occasion. The peers did not make the summons in their own name, because they could not summon their lord, but they could summon * for their lord.

Sometimes † the appeal of default of justice was followed with an appeal of false judgment, when the lord had caused judgment to be passed, notwithstanding the default.

The vaffal ‡ who had wrongfully appealed his lord of default of justice, was sentenced to pay a

fine according to his lord's pleafure.

The inhabitants of Gaunt | had appealed the Earl of Flanders of default of justice before the king, for having delayed to give judgment in his own court. Upon examination it was found that he had used less delays than even the custom of the country allowed. They were therefore remanded to him; upon which their effects, to the value of fixty thousand livres, were seized. They returned to the king's court in order to have this fine moderated; but it was decided that the Earl might infist upon this fine, and even more if he pleased. Beaumanoir was present at those judgements.

4. In other disputes which the lord might have with his vassal, in respect to the body or honour of the latter, or to goods that did not belong to the fief, there was no room for an appeal of default of justice; because the cause was not tried in the lord's court, but in that of the paramount; vassals, says

* Defontaines, chap. 21. art 9.

+ Beaumanoir, chap. 61. page 34.

Beaumanoir, chap. 61. page 318.

[†] Beaumanoir, chap. 61. page 312. But he that was neither tenant nor vassal to the lord, paid only a fine of fixty livres. Ib.

Defontaines *, having no power to give judgement

on the body of their lord.

I have been at some trouble to give a clear idea of those things, which are so obscure and confused in old authors, that to draw them from the chaos in which they were involved, may be reckoned a new discovery.

CHAP. XXIX.

Epoch of the reign of St. Lewis.

ST. Lewis abolished the judicial combats in all the courts of his demesne, as appears by the ordinance he † published on that account, and ‡ by the institutions.

But he did not suppress them in the courts of his barons, except in the case of appeal of false judge-

ment.

A vaffal could not appeal the court of his lord of false judgement, without demanding a judicial combat against the judges who had pronounced sentence. But St. Lewis § introduced the practice of apealing of false judgement without fighting, a change that may be reckoned a kind of revolution.

He declared ‡ that there should be no appeal of false judgement in the lordships of his demesse, because it was a crime of felony. In fact, if it was a kind of felony against the lord, by a much strong-

† In the year 1260.

^{*} Chap. 21. art. 35.

[‡] Book i. chap. 2, & 7. and book ii. chap. 10, & 11.

As appears every where in the institutions, &c., and Beaumanoir, chap. 61. page 309.

Institutions, book i. chap. 6. and book ii. chap. 15.

⁴ Ib. book ii. chap. 15.

er reason it was felony against the king. But he consented they might demand an amendment * of the judgements passed in his courts; not because they were false or iniquitous, but because they did some prejudice †. On the contrary, he ordained, that they should be obliged to make an appeal of false judgement against the courts of the barons ‡,

in case of any complaint.

It was allowed by the inftitutions, as we have already observed, to bring an appeal of false judgement against the courts in the king's demesnes. They were obliged to demand an amendment before the same court; and in case the bailist resused the amendment demanded, the king gave leave to make an appeal | to his court, or rather, interpreting the institutions by themselves, to present him a sequest or petition.

With regard to the courts of the lords, St. Lewis, by permitting them to be appealed of false judgement, would have the cause brought 4 before the royal tribunal, or that of the lord paramount, not + to be decided by duel, but by witnesses, purfuant to a form of proceeding, the rules of which

he laid down in the institutions ++.

Thus, whether they could falfify the judgement, as in the courts of the barons, or whether they could not falfify, as in the courts of his demesne,

| Ib. chap. 78. | 6 Ib. chap. 15.

+ Book ii. chap. 6, & 47. and book ii. chap. 15. & Beaumanoir, chap. 11. page 58.

++ Book i. chap. 1, 2, and 3.

^{*} Ib. book i. chap. 78, and book ii. chap. 15.

[†] Ib. book i. chap. 78. ‡ Ib. book ii. chap. 15.

⁴ But if they wanted to appeal without falfifying the judgement, the appeal was not admitted. Institutions, book ii. chap. 15.

he ordained that they might appeal without run-

ning the hazard of a duel.

Defontaines * gives us the two first examples he ever saw, in which they proceeded thus without a legal duel; one in a cause tried at the court of St. Quintin, which belonged to the king's demesse; and the other in the court of Ponthieu, where the count who was present opposed the ancient jurisprudence: But these two causes were decided by law.

Here perhaps it will be asked, why St. Lewis ordained for the courts of his barons a different form of proceeding from that which he had established in the courts of his demesne? The reason is this: When St. Lewis made the regulations for the courts of his demesnes, he was not checked nor confined in his views: But he had measures to keep with the lords who enjoyed this ancient prerogative, that causes should not be removed from their courts. unless the party was willing to expose himself to the dangers of an appeal of false judgement. Lewis preferved the usage of this appeal; but he ordained that it should be made without a judicial combat, that is, in order to render the change more infenfible, he suppressed the thing, and continued the terms.

This regulation was not univerfally received in the courts of the lords. Beaumanoir † fays, that in his time there were two ways of judging; one according to the king's establishment, and the other pursuant to the ancient practice; that the lords were at liberty to follow which way they pleased; but when they had pitched upon one in any cause, they could not afterwards have recourse to the other. He adds ‡, that the count of Clermont sollowed the new practice, while his vassals kept to

^{*} Chap. 22. art. 16. and 17.

[†] Chap. 61. page 309. ‡ Ibid.

the old one; but that it was in his power to reestablish the ancient practice whenever he pleased, otherwise he would have less authority than his vassals.

It is proper here to observe, that France was at that time * divided into the country of the king's demefoe, and that which was called the country of the barons, or the baronies, and, to make use of the terms of St. Lewis's institutions, into the country under obedience to the king, and the country out of his obedience. When the kings made ordinances for the country of their own demesne, they employed their own fingle authority. But when they published any ordinances that concerned also the country of their barons, they were made + in concert with them, or fealed and fubscribed by them: Otherwife the barons received or refused them, according as they feemed conducive to the good of their baronies. The rear-vaffals were upon the same terms with the great vassals. Now, the institutions were not made with the confent of the lords, though they regulated matters which to them were of great importance: But they were received only by those who believed they would redound to their advantage. Robert, fon of St. Lewis, received them in his county of Clermont; yet his vaffals did not think proper to conform to this practice.

* See Beaumanoir, Defontaines, and the inslitu-

tions, book ii. chap. 10, 11, 15, and others.

† See the ordinances at the beginning of the third race in the collection of Lauriere, especially those of Philip Augustus, on ecclesiastic jurisdiction, and that of Lewis VIII. concerning the Jews, and the charters related by Mr. Brussels particularly that of St. Lewis, on the lease and recovery of lands, and the seodal majority of young women, tome 2. book xxxii. page 35, et ibid. the ordinance of Philip Augustus, page 7.

CHAP. XXX.

Observations on appeals.

I Apprehend, that appeals, which were challenges to a combat, must have been made immediately on the spot. If the party leaves the court without oppealing, says Beaumanoir *, he loses his appeal, and the judgement stands good. This continued still in force, even after all the restrictions of judicial combats.

CHAP. XXXI.

The same subject continued.

THE villain could not bring an appeal of false judgement against the court of his lord. This we learn from Defontaines ‡, and is confirmed moreover by the institutions ||. Hence Defontaines § says, Between the lord and his villain there is no other judge but God.

It was the custom of judicial combats that had deprived the villains of the privilege of appealing their lord's court of false judgement +. And so true is this, that those villains +, who by charter or

custom

* Chap. 63. page 327. Ibid. chap. 61. page 312. † See the inftitutions of St. Lewis, book ii. chap. 15. The ordinance of Charles VII. in 1453.

‡ Chap. 21. art. 21. & 22.

| Book i. chap. 136. 6 Chap. 2. art. 8.

+ Chap. 22. art. 14.

+ Defontaines, chap. 22. art. 7. This article and the 21st of the 22d chapter of the same author have been hitherto very ill explained. Defontaines does not oppose the judgment of the lord to that of the Vol. II.

P p gentleman,

custom had a right to fight, had also the privilege of appealing their lord's court of false judgement, even though the peers who judged them were * gentlemen: And Defontaines proposes expedients to gentlemen in order to avoid the scandal of fighting with a villain, by whom they had been appealed of false judgement.

As the practice of judicial combats began to decline, and the usage of new appeals to be introduced, it was reckoned unjust that freemen should have a remedy against the injustice of the court of their lords, and the villains should not; hence the parliament received their appeals all the same as

those of freemen.

CHAP. XXXII.

The same subject continued.

When an appeal of false judgement was brought against the lord's court, the lord appeared in person before his paramount, to defend the judgement of his court. In like manner + in the appeal of default of justice, the party summoned before the lord paramount brought his lord along with him, to the end that if the default was not proved, he might recover his jurisdiction.

In process of time, as the practice observed in those two particular cases was become general, by the introduction of all sorts of appeals, it seemed very extraordinary that the lord should be obliged to spend his whole life in strange tribunals, and

gentleman, because it was the same thing; but he opposes the common villain to him who had the privilege of fighting.

* Gentlemen may be always appointed judges. De-

fontaines, chap. 21. art 48.

+ Defontaines, chap. 21. art. 33.

for other people's affairs. Philip of Valois *, ordained, that none but the bailiffs should be summoned; and when the usage of appeals became still more frequent, the parties were obliged to defend the appeal: The fact + of the judge became that of

the party.

I took ‡ notice that in the appeal of default of justice, the lord lost only the privilege of having the cause tried in his own court. But if the lord himself was sued as party #, which was become a very common practice §, he paid a fine of sixty livres to the king, or to the paramount, before whom the appeal was brought. From thence arose the usage, after appeals had been generally received, of sining the lord upon the amendment of the sentence of his judge: An usage which lasted a long time, and was consirmed by the ordinance of Roussillon, but fell at length to the ground through its own absurdity.

CHAP. XXXIII.

The same subject continued.

IN the practice of judicial combats, the person who had appealed one of the judges of false judgement, might lose \downarrow his cause by the combat, but could not possibly gain it. In fact, the party who had a judgement in his favour, ought not to have been deprived of it by another man's act. The ap-

* In the year 1332.

[†] See the fituation of things in Boutillier's time, who lived in the year 1402. Somme Rurale, book i. pages 19, and 20.

[‡] See chap. 30.

Beaumanoir, chap. 61. page 312, and 318.

blid. Defontaines, chap. 21. art. 14.

P p 2 pellant

pellant therefore, who had gained the battle, was obliged to fight likewise against the adverse party: not in order to know whether the judgement was good or bad, (for this judgement was out of the cafe, being reversed by the combat), but to determine whether the demand was just or not; and it was on this new point they fought. From thence proceeds our manner of pronouncing arrefts, The court annuls the appeal; the court annuls the appeal, and the judgment against which the appeal was brought. In effect, when the person who had made the appeal of false judgement, happened to be overcome, the appeal was reverfed; when he proved victorious, both the judgement and the appeal were reverfed: Then they were obliged to proceed to a new judgement.

This is so far true, that when the cause was tried by inquest, this manner of pronouncing did not take place: Witness what M. de la Roche Flavin * fays, namely, that the chamber of inquests could not use this form at the beginning of its creation.

CHAP. XXXIV.

In what manner the proceedings at law became fecret.

DUELS had introduced a public form of proceeding, so that both the attack and the defence were equally known. The witnesses, says Beaumanoir +, ought to give in their testimony in

open court.

Boutillier's commentator fays, he had learned of ancient practitioners, and from some old manuscript law-books, that criminal processes were anciently carried on in public, and in a form not very different from the public judgments of the Romans. This was owing to their not knowing how

* Of the parliaments of France, book i. chap. 16.

† Chap. 61. page 315.

to write; a thing in those days very common. The usage of writing fixes the ideas, and preserves the secret; but when this usage is laid aside, nothing but the publickness of the proceeding is capable of

fixing those ideas.

And as uncertainty * might easily arise-in respect to what had been judged by vassals, or pleaded before vassals, they could therefore refresh their memory, every time they held a court, by what was called proceedings on record †. In that case it was not allowed to challenge the witnesses to combat: For then there would be no end of disputes.

In process of time a secret form of proceeding was introduced. Every thing before had been public; every thing now became secret; the interrogatories, the informations, the re-examinations, the confronting of witnesses, the opinion of the public prosecutor; and this is the present practice. The first form of proceeding was suitable to the government of that time, as the new form was pro-

per to the government fince established.

Boutillier's commentator fixes the epoch of this change to the ordinance in the year 1539. I am apt to believe that this change was made infenfibly, and passed from one lordship to another, in proportion as the lords renounced the ancient form of judging, and that derived from the institutions of St. Lewis was improved. In fact, Beaumanoir says ‡, that witnesses were publicly heard only in cases in which it was allowed to give pledges of battle: In others, they were heard in secret, and their depositions were reduced to writing. The proceedings became therefore secret when they ceased to give pledges of battle.

* As Beaumanoir says, chap. 39. page 209.

[†] They proved by witnesses what had been already done, faid, or decreed in court.

[‡] Chap. 39. page 218.

CHAP. XXXV.

Of the costs.

IN former times no one was condemned in France to the payments of costs * in temporal courts. The party cast was sufficiently punished by sentences of pecuniary fines to the lord and his peers. From the manner of proceeding by judicial combat it followed, that the party who was condemned and deprived of life and fortune, was punished as much as he could be: And in the other cases of the judicial combat, there were fines fometimes fixed, and fometimes dependent on the disposition of the lord, which were fufficient to make people dread the events of fuits. The fame may be faid of causes that were not decided by combat. As the lord had the chief profits, fo he was also at the chief expence, either to affemble his peers, or to enable them to proceed to judgement. Besides, as disputes were generally determined on the spot, and without that infinite multitude of writings which afterwards followed, there was no necessity of allowing costs to the parties.

The custom of appeals naturally introduced that of giving costs. Thus Defontaines + says, that when they appealed by written law, that is, when they followed the new laws of St. Lewis, they gave costs; but that in the usual custom, which did not permit them to appeal without falsifying the judgement, no costs were allowed. They obtained only a fine, and the possession for a year and a day of

+ Chap. 22. art. 8.

^{*} Defontaines, in his counsel, chap. 22. art. 3, & 8. and Beaumanoir, chap. 33. Institutions, book i. chap. 90.

the thing contested, if the cause was remanded to the lord.

But when the number of appeals increased from the new facility of appealing *; when by the frequent usage of these appeals from one court to another, the parties were continually removed from the place of their residence; when the new method of proceeding multiplied and eternized the fuits; when the art of eluding the very justest demands was refined; when the parties at law knew how to fly only in order to be followed; when actions proved destructive, and pleas easy; when the reasons were loft in whole volumes of writings; when the world was filled with members of the law, who were strangers both to law and justice; when knavery found advice where it found no support; then it was necessary to deter litigious people by the fear of costs. They were obliged to pay costs for the judgement, and for the means they had employed to elude it. Charles the Fair made a general ordinance on that subject +.

CHAP. XXXVI.

Of the public profecutor.

AS by the Salic, Ripuarian, and other barbarous laws, crimes were punished with pecuniary fines; they had not in those days, as we have at present, a public officer who has the care of criminal persecutions. In effect, the issue of all causes being reduced to the reparation of damages, every prosecution was in some measure civil, and might be managed by any one. On the other hand, the

^{*} At present when they are so inclined to appeal, says Boutillier, Somme Rurale, book i. tit. 3. page 16.

[†] In the year 1324.

Roman law had popular forms for the profecution of crimes, which were inconfiftent with the office of a public profecutor.

The custom of judicial combats was no less oppofite to this idea: for who is it that would chuse to make himself every man's champion against all the

world?

I find in the collection of formulas, inserted by Muratori in the laws of the Lombards, that under our princes of the second race there was an advocate of the public * prosecutor. But whosoever pleases to read the entire collection of these formulas, will find there was a total difference between those officers and what we now call the public prosecutor, our attorney-generals, our king's solicitors, or our solicitors of the nobility. The former were rather agents of the public for the management of political and domestic affairs, than for the civil. In fact, we do not find in these formulas that they were intrusted with criminal prosecutions, or with causes relating to minors, to churches, or to the condition of persons.

I faid that the establishment of a public prosecutor was repugnant to the usage of judicial combats. I find notwithstanding, in one of those formulas, an advocate of the public prosecutor, who had the liberty to fight. Muratori has placed it just after the constitution † of Henry I. for which it was made. In this constitution it is said, "That if any man kills his father, his brother, or any of his other relations, he shall lose their succession, which shall pass to the other relations, and his own shall go to the exchequer." Now, it was in suing for the succession which had devolved to the exchequer, that the advocate of the public prose-

* Advocatus de parte publica.

[†] See this constitution and this formula in the second volume of the historians of Italy, page 175.

cutor, by whom its rights were defended, had the privilege of fighting: this case fell within the general rule.

We see in those formulas the advocate of the public profecutor proceeding against + a person who had taken a robber, but had not brought him before the count; against another ‡ who had raised an infurrection or tumult against the count; againft another | who had faved a man's life whom the count had ordered to be put to death; against the advocate of fome churches, whom the count had commanded to bring a robber before him, but had not obeyed; against * another who had revealed the king's fecret to strangers; against 4 another who with open violence had attacked the emperor's commiffary; against another + who had been guilty of contempt to the emperor's rescripts, and he was profecuted either by the emperor's advocate, or by the emperor himself; against ** another who refused to accept of the prince's coin; in fine, this advocate fued for things, which by the law were adjudged to the exchequer &.

But, in criminal causes, we never meet with the advocate of the public prosecutor; not even where duels are used; †† not even in the case of incendiaries; ‡‡ not even when the judge is killed || || on his bench; not even in causes relating to the condition

of persons ++, to liberty and flavery ...

These formulas are made not only for the laws

† Collection of Muratori, page 104. on the 88th law of Charlemagne, book 1. tit. 26. § 78.

‡ Another formula, ib. page 87.

| Ibid. page 104. | § Ibid. p. 95.

* Ibid. page 88.

1 lbid. page 98. †† Ibid page 113.

** Ibid. §§ Ibid. page 137.

Ibid page 168. ++ Ibid. page 134.

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of the Lombards, but likewise for the capitularies added to them; so that we have no reason at all to doubt of their giving us the practice observed under our princes of the second race upon this

fubject.

As the usage of combats was become more frequent under the third race, it did not allow of any fuch thing as a public prosecutor. Hence Boutilier, in his Somme Rurale, speaking of the officers of justice, takes notice only * of the bailists, the

peers, and ferjeants.

I find in the laws + of James II. king of Majorca, a creation of the office of the king's attorneygeneral ‡, with the very fame functions as are exercifed at prefent by the officers of that name amongst us. It is manifest that this office was not instituted till we had changed the form of our judiciary proceedings.

CHAP. XXXVII.

In what manner the institutions of St. Lewis fell into oblivion,

IT was the fate of the Institutions, that their origin, progress, and decline, were comprised within a very short period.

I shall make a few reflections upon this subject.

* See also the Institutions, book 1. chap. 1. book 2. chap. 11. & 13. and Beaumanoir, chap. 61. page 308. concerning the manner in which prosecutions were managed in those days.

+ See these laws in the lives of the Saints of the

month of June, tom. 3. page 26.

† Qui continue nostram sacram curiam sequi teneatur, instituatur qui facta & causas in ipsa curia proinqueat atque prosequatur.

The

The code we have now under the name of St. Lewis's institutions, was never designed as a law for the whole kingdom, though fuch a defign is mentioned in the preface to this code. This compilement is a general code, which determines all points relating to civil affairs, to the disposal of property by will or otherwife, the doweries and advantages of women, the profits and prerogatives of fiefs, and the affairs relating to the police, &c. Now, to give a general body of civil laws, at a time when each city, town, or village had its customs, was attempting to subvert in one moment all the particular laws that were then in force in every part of the kingdom. To reduce all the particular customs to a general one, would be a very inconfiderate thing, even at prefent, when our princes find in all parts the most passive obedience. But if it be a rule, that we ought not to change when the inconveniencies are equal to the advantages, much lefs ought we to change when the advantages are fmall, and the inconveniencies immense. Now, if we attentively confider the fituation which the kingdom was in at that time, when every lord was puffed up with the notion of his fovereignty and power, we thall find that to attempt a general change of the received laws and customs, must be a thing that could never enter into the heads of those who were then in the administration.

What I have been faying, proves likewife that this code of institutions was not confirmed in parliament by the barons and magistrates of the kingdom, as is mentioned in a manuscript of the townhouse of Amiens, quoted by Mons. Ducange 12 We find in other manuscripts, that this code was given by St. Lewis in the year 1270, before he set out for Tunis. But this fact is not truer than the other; for St. Lewis set out upon that expedition in 1269, as Mons. Ducange observes: from whence he concludes, that this code might have been pub-

lished in his absence. But this, I say, is impossible. How can St. Lewis be imagined to have pitched upon the time of his absence for transacting an affair which would have been the seed of troubles, and might have produced not only changes, but revolutions? An enterprise of that kind had need, more than any other, of being closely pursued, and could not be the work of a feeble regency, composed moreover of lords §, whose interest it was that it should not succeed.

Thirdly, I affirm it to be very probable, that the code now extant is quite a different thing from St. Lewis's institutions. This code cites the Institution ons; therefore it is a work written upon the Inftitutions, and not the Institutions themselves. fides, Beaumanoir, who frequently makes mention of St. Lewis's institutions, quotes only some particular inftitutions of that prince, and not this compilement. Defontaines *, who wrote in that prince's reign, makes mention of the two first times that his institutions on judicial proceedings were put in execution, as of a thing long fince elapsed. The institutions of St. Lewis were prior therefore to the compilement I am now speaking of, which in rigour, and adopting the erroneous prefaces prefixed by fome ignorant perfons to that work, could not have been published before the last year of St. Lewis, or even not till after his death.

[§] Matthew abbot of St. Denys, Simon of Clermont count of Nelle, and in case of death Philip bishop of Evreux, and John count of Ponthieu. We have seen above in the 30th chapter, that the count of Ponthieu opposed the execution of a new judiciary order in his lordship. This sact is related by Desontaines.

^{*} See above, chap. 30.

C H A P. XXXVIII.

The same subject continued.

WHat is this compilement then which goes at present under the name of St. Lewis's institutions? What is this obscure, confused, and ambiguous code, where the French law is continually mixed with the Roman, where a legistator speaks, and yet we fee a civilian, where we find a complete digeft of all cases and points of the civil law? To understand this thoroughly, we must transfer ourfelves in imagination to those times.

St. Lewis feeing the abuses in the jurisprudence of his time, endeavoured to give the people a dif-With this view he made feveral regulations for the courts of his demesnes, and for those of his barons. And fuch was his fuccess, that Beaumanoir +, who wrote a little after the death of that prince, informs us, that the manner of judgeing established by St. Lewis, obtained in a great number of the courts of the barons.

Thus this prince attained his end, though his regulations for the courts of the lords were not defigned as a general law for the kingdom, but as a model which every one might follow, and would even find an interest in following. He removed the evil by rendering them fenfible of the good. When it appeared that his courts, and those of fome lords, had chosen a form of proceeding more natural, more reasonable, more conformable to morality, to religion, to the public tranquillity; and to the fecurity of a person and property; this form was soon adopted, and the other rejected.

To invite when it is improper to constrain, to lead when, it is improper to command, is the highest point of ability. Reason has a natural, nay, it has even a tyrannical sway; it meets with resistance, but this very resistance forms its triumph; for after a short struggle it forces an entire submission.

St. Lewis, in order to give a distaste of the French jurisprudence, caused the books of the Roman law to be translated; by which means they were made known to the lawyers of those times. Desontaines, who is the oldest ‡ law-writer we have, made great use of those Roman laws. His work is in some measure a result of the ancient French jurisprudence, of the laws or institutions of St. Lewis; and of the Roman law. Beaumanoir made very little use of the latter; but he reconciled the ancient French laws with the regulations of St. Lewis.

I have a notion therefore that the law-book known by the name of the Institutions, was compiled by some bailiffs, with the same design as that of the authors of those two works, and especially of Defontaines. The title of this work mentions: that it is wrote according to the usage of Paris, of Orleans, and of the court of barony; and the preamble fays, that it treats of the usages of the whole kingdom, and of Anjou, and of the court It is plain, that this work was made of barony. for Paris, Orleans, and Anjou, as the works of Beaumanoir and Defontaines were made for the countries of Clermont and Vermandois; and as it appears from Beaumanoir, that divers laws of St. Lewis had been received in the courts of barony, the compiler was in the right to fay, that this work related also to those courts.

[†] He says of himself in his prologue, Nus lui en prit onques mois cette chose dont j'ai.

It is manifest, that the person who composed this work, compiled the customs of the country, together with the laws and institutions of St. Lewis. This is a very valuable work, because it contains the ancient custom of Anjou, the institutions of St. Lewis as they were then in use; and, in fine, the

whole practice of the ancient French law.

Nothing can be fo vague as the title and prologue to those institutions, which must certainly have been foisted in by some ignorant hand. At first, they are the usages of Paris, of Orleans, and of the courts of barony; afterwards they are the usages of all the temporal courts of the kingdom, and of the provostship of France; at length they are the usages of the whole kingdom, and of Anjou, and

of the courts of barony.

I fancy that St. Lewis caused this work to be undertaken, and that it was finished by his successour. One or both of those princes ordered some customs of their demesnes to be reduced into writing; and because these customs were there confounded with the laws lately made by St. Lewis, the work was called St. Lewis's institutions. In fact, so great a name must naturally have given it a fanction. All this was published under a general form; and the whole affair was most prudently managed. By reducing them into writing, they became more known; and by giving them a general form, their use was more extended. The laws of the kingdom were at that time nothing elfe but the customs of each place retained in the memories of old men. In this general infufficiency, every one might find in the new code what was wanting in those laws; this was a fource from whence they might all draw. The difference between this work, and those of Defontaines and Beaumanoir, is its speaking in imperative terms as a legislator; and this might be right, as it was a mixture of written customs and laws.

CHAP. XXXIX.

The fame fubject continued.

There was an intrinsic defect in this compilement; it formed an amphibious code, where the French and Roman laws were mixed; and where things were joined that were no way relative, but often contradictory to each other. It is impossible to form a good system of laws from two considerations.

trary digefts.

I am not ignorant that the French courts of vaffals or peers, the judgements without power of appealing to another tribunal, the manner of pronouncing fentence by these words, I condemn ||, or, I absolve, had some conformity to the popular judgements of the Romans. But they made very little use of that ancient jurisprudence; they rather chose that which was afterwards introduced by the emperors, and employed it through the whole compilement, in order to regulate, limit, correct, and extend the French jurisprudence.

Lt. Lewis, as we have already observed, had caufed the works of Justinian to be translated, in order to give credit to the Roman law. It was soon taught in the schools; for they liked it better in its natural form, than in the dissigned shape in which

it appeared in the new code.

Besides, this compilement made decrees in respect to several things that no longer existed, such as the judgement of peers, judicial combats, private wars, the slavery of the Jews, the crusades, and bondmen. And as the following ages were remarkable for changes, the more changes they made, the more they had occasion to make; so that this code was always less sitted to the actual state of things,

especially as the local dispositions contained therein

were also changed.

Farther, the judiciary forms introduced by St. Lewis fell into difuse. This prince had not fo much in view the thing itself, that is, the best manner of judging, as the best manner of supplying the ancient practice of judging. The principal intent was to give a difrelish of the ancient jurisprudence. and the next to form a new one. But when the inconveniencies of the latter appeared, another foon forceeded.

The inflitutions of St. Lewis did not therefore fo much change the French jurisprudence, as they afforded the means of changing it; they opened new tribunals; or rather ways to come at them. And when once the access was easy to that which was vefted with the general authority, the judgements, which before constituted only the usages of a particular lordship, formed an universal digest. means of the inftitutions they had obtained general decifions, which were entirely wanting in the kingdom: when the building was finished, they let the scaffold fall to the ground.

Thus the institutions produced effects which could hardly be expected from a mafterpiece of legiflation. To prepare great changes, fometimes whole ages are requifite; the events ripen, and

then the revolutions fucceed.

The parliament judged in the last resort of almost all the affairs of the kingdom. Before *, it took cognisance only of disputes between the dukes, counts, barons, bishops, abbots, or between the king and his vaffals t, rather in the relation they had to the political, than to the civil order. They

* See Du Tillet on the court of peers. See also Laroche Flavin, book. 1. chap. 3. Budzus, & Paulus Æmilius.

† Other causes were decided by the ordinary tribunals.

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were foon obliged to render it permanent, whereas it used to be held only a few times in a year; and, in fine, a great number were created, in order to be sufficient for the decision of all manner of causes.

No fooner was the parliament become a fixed body, than they began to compile its decrees. John de Monluc, under the reign of Philip the Fair, made a collection which at present is known by the name of the Olim registers.

CHAP. XL.

In what manner the judiciary forms were borrowed from the decretals.

BUT how comes it, some will say, that when the Institutions were laid aside, the judicial forms of the canon law should be preferred to those of the Roman? It was because they had constantly before their eyes the ecclesiastic courts, which followed the forms of the canon law, and they knew no court that followed those of the Roman law. Besides, the limits of the spiritual and temporal jurisdiction were at that time very little known: there were * people † who sued indifferently, and causes that were tried indifferently, in either court. It seems ‡ as if the temporal jurisdiction reserved no other cases exclusively to itself than the judgement of feudal matters ||, and of crimes committed by laymen in cases not relating to religion. For § if,

* Beaumanoir, chap. 11. p. 458

+ Widows, croifes, &c. Beaumanoir, chap. 11. p. 58.

t See the whole 11th chap. of Beaumanoir.

The spiritual courts had even laid hold of these, under the pretext of the oath, as may be seen by the famous concordat between Philip Augustus, the clergy, and the barons, which is found in the ordinances of Lauriere.

⁶ Beaumanoir, chap. 11. page 60.

on the account of conventions and contracts, they had occasion to sue in a temporal court, the parties might of their own accord proceed before the spiritual courts; and as the latter had not a power to oblige the temporal court to execute the sentence, they made people obey by means of excommunications. Under those circumstances, when they wanted to change the courts of proceedings in the temporal courts, they took that of the spiritual courts, because they knew it; and did not meddle with that of the Roman law, because they were strangers to it: for in point of practice, people know only what is practiced.

CHAP. XLI.

Flux and reflux of the ecclesiastic and temporal jurisdiction.

THE civil power being in the hand of an infinite number of lords, it was an easy matter for the ecclesiastic jurisdiction to gain every day a greater extent. But as the ecclesiastic courts weakened those of the lords, and contributed thereby to give strength to the royal jurisdiction, the latter gradually checked the jurisdiction of the clergy. The parliament, which in its form of proceedings had adopted whatever was good and useful in the spiritual courts, soon perceived nothing else but the abuses which had crept into those courts; and as the royal jurisdiction gained ground every day, it grew every day more capable of correcting those abuses. In fact, they were intolerable; and, without enumerating them, I shall refer * the reader to

* See Boutillier, Somme Rurale, tit. 9. what perfons are incapable of fuing in a temporal court; and Beaumanoir, chap. 11. page 56. and the regulations of Philip Augustus upon this subject; as also the regulations between Philip Augustus, the clergy, and the barons.

Beaumanoir, to Boutillier, and to the ordinances of our kings. I thall mention only two, in which the public interest was more directly concerned. These abuses we know by the decrees that reformed them: they had been introduced in the times of the darkest ignorance, and upon the breaking out of the first gleam of light, they vanished. By the filence of the clergy it may be prefumed, that they forwarded this reformation: which, confidering the nature of the human mind, deferves commendation. Every man that died without bequeathing a part of his estate to the church, which was called dying without confession, was deprived of the facrament, and of Christian burial. If he died without making a will, his relations were obliged to prevail upon the bishop, that he would jointly with them name proper arbiters, to determine what fum the deceased ought to have given, in case he had made a will. People could not lie together the first night of their nuptials, nor even the two following nights, without having previously purchased leave: these indeed were the three best nights to chuse; for as to the others, they were not worth much. All this was redreffed by the parliament: we find in the + gloffary of the French law, by Ragau, the arret which it published ‡ against the bishop of Amiens.

I return to the beginning of my chapter. Whenever we observe, in any age or government, the different bodies of the state endeavouring to increase their authority, and to take particular advantages of each other, we should be often mistaken, were we to consider their incroachments as an evident mark of their corruption. Through a fatality infeparable from human nature, moderation in great men is very rare: and as it is always much easier

⁺ In the word Testamentary executors.

t The 19th of March, 1409.

to push on force in the direction in which it moves, than to stop its movement; so in the superiour class of the people it is less difficult, perhaps, to find men extremely virtuous, than extremely pru-

The foul feels fuch an exquifite pleafure in domineering; even those who are lovers of virtue are so excessively fond of themselves, that there is no man to happy, as not to have still reason to mistrust his honest intentions: and indeed our actions depend on fo many things, that it is infinitely more easy to do good, than to do it well.

CHAP. XLII.

The revival of the Roman law, and the refult thereof. Change in the tribunals.

I Pon the discovery of Justinian's digest towards the year 1137, the Roman law seemed to rise out of its ashes. Schools were then established in Italy, where it was publicly taught: they had already the Justinian code, and the Novels. I mentioned before, that this code had been fo favourably received in that country, as to eclipse the law of the Lombards.

The Italian doctors brought the law of Justinian into France, where they had only * the Theodofian code; because Justinian's laws were not made + till after the fettlement of the barbarians in Gaul. This law met with fome opposition; but it stood its ground, notwithstanding the excommu-

* In Italy they followed Justinian's code : hence Pope John VIII. in his conflitution published after the fynod of Troyes, makes mention of this code, not because it was known in France, but because he knew it himself, and his constitution was general.

† This emperor's code was published towards the

year 530.

nications of the popes, who supported ‡ their own canons. St. Lewis endeavoured to bring it into repute by the translations made by his orders of Justinian's works, which are still in manuscript in our libraries; and I have already observed, that they made great use of them in compiling the Institutions. Philip the Fair || ordered the laws of Justinian to be taught, only as written reason, in those provinces of France that were governed by customs; and they were adopted as a law in those provinces where the Roman law had been received.

I have already taken notice, that the manner of proceeding by judicial combat, required very little knowledge in the judges: disputes were decided according to the usage of each place, and pursuant to a few simple customs received by tradition. In Beaumanoir's time & there were two different ways of administering justice; in some places they tried by peers *, in others by bailists: in sollowing the sirft way, the peers gave judgement †, according to the usage of their court; in the second it was the prodes homines, or old men, who pointed out this same usage to the bailists. This whole proceeding required neither learning, capacity, nor study. But when the dark code of the institutions made its ap-

† Decretals, book 5. tit. de privilegiis, capite super specula.

By a charter in the year 1312, in favour of the

univerfity of Orleans, quoted by Du Tillet.

& Customs of Beauvoisis, chap. 1. of the office of bailiffs.

*Among the common people the burghers were tried by burghers, and the feudatory tenants were tried by one another. See la Thaumassiere, chap. 19.

+ Thus all requests began with these words. "My "Lord Judge, it is cultomary that in your court," &c. as appears from the formula quoted by Boutillier, Somme Rurale, book 1. tit. 31.

pearance,

pearance, when the Roman law was translated, and taught in public schools, when a certain art of precedure and jurisprudence began to be formed, when practitioners and civilians were feen to rife; the peers and the prodes homines were no longer capable of judging: the peers began to withdraw from the lords tribunals; and the lords were very little inclined to affemble them; especially as the new form of trial, instead of being a pompous action agreeable to the nobility, and interesting to a warlike people, was become a course of pleading, which they neither understood, nor cared to learn. The custom of trying by peers began to ‡ be less used; that of trying by bailiffs to be more so: the bailiffs did not give | judgement themselves, they fummed up the evidence, and pronounced the judgement of the prodes homines; but the latter being no longer capable of judging, the bailiffs themfelves gave judgement.

This was effected so much the easier, as they had before their eyes the practice of the ecclesiastic

† The change was infensible; we meet with trials by peers even in Boutillier's time, who lived in the year 1403, which is the date of his will: but nothing but feudal matters were tried any longer by the peers.

Boutillier, book 1. tit. 1. p. 16.

As appears by the formula of the letters which their lord used to give them, quoted by Boutillier, Somme Rurale, book 1. tit. 14. Which is proved likewise by Beaumanoir, custom of Beauvoisis, chap. 1. of the bailiss; they only directed the proceedings: "The bailiss is obliged in the presence of the peers to take down the words of those who plead, and to ask the parties whether they are willing to have judge-ment given according to the reasons alleged: and if they say, Yes, my Lord; the bailiss ought to oblige the peers to give judgement." See also the institutions of St. Lewis, book 1. chap. 105. and book 2. chap. 15.

courts; the canon and new civil law both concur-

red alike to abolish the peers.

Thus fell the usages hitherto constantly observed in the French monarchy, that judgement should not be pronounced by a fingle person, as may be seen in the Salic law, the Capitularies, and in the first * law-writers under the third race. The contrary abuse, which obtains only in local jurisdictions, has been moderated, and in some measure redressed, by introducing in many places a judge's deputy, whom he consults, and who represents the ancient prodes homines; by the obligation the judge is under of taking two graduates, in cases that deserve a corporal punishment; and, in fine, it is become of no manner of effect by the extreme facility of appeals.

CHAP. XLIII.

The fame subject continued.

Thus there was no law to inhibit the lords from holding their courts themselves; no law to abolish the functions of their peers; no law to ordain the creation of bailiffs; no law to give them the power of judging. All this was effected insensibly, and by the very necessity of the thing. The knowledge of the Roman law, the arrets of the courts, the new digest of the customs, required a study of which the nobility and illiterate people were incapable.

The only † ordinance we have upon this subject, is that which obliged the lords to chuse their bailiss from among the laity. It is a mistake to look upon this as the law of their creation; for it says no such

^{*} Beaumanoir, chap. 67. page 336. & chap. 61. & pag. 5. & 316 The inflitutions, book 2. chap. 15. † It was published in the year 1287.

hing. Besides, it fixes what it prescribes, by the reasons it gives: To the end, that the bailiffs may be punished + for their prevarications, it is necessary they be taken from the order of the laity. The immunities of the clergy in those days are well known.

We must not imagine that the privileges which the nobility formerly enjoyed, and of which they are now divested, were taken from them as usurpations: no; many of those privileges were lost through neglect, and others were given up, because as various changes had been introduced in the course of so many ages, they were inconsistent with those changes.

CHAP. XLIV.

Of the proof by witnesses.

THE judges, who had no other rule to go by than the usages, inquired very often by witnesses into every cause that was brought before them.

The usage of judicial combats beginning to decline, they made their inquests in writing. But a verbal proof committed to writing, is never more than a verbal proof; so that this only increased the expenses of law-proceedings. Regulations were then made, which rendered most of those inquests * useless; public registers were established which ascertained most facts, as nobility, age, legitimacy, and marriage. Writing is a witness very hard to corrupt; the customs were therefore reduced to writing. All this is very reasonable; it is much easier to go and see in the baptismal register, whether Peter is the son of Paul, than to prove this fact by a tedious inquest. When there are a great

⁺ Ut si ibi delinquant, superiores sui possint animadvertere in eosdem.

^{*} See in what manner age and parentage were proved. Institution, book i. chap. 71, 72.

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number of usages in a country, it is much easier to write them all down in a code, than to oblige individuals to prove every usage. At length the famous ordinance was made, which prohibited the admitting of the proof by witnesses, for a debt exceeding an hundred livres, except there was the beginning of a proof in writing.

CHAP. XLV.

Of the customs of France.

FRANCE, as we have already observed, was governed by unwritten customs; and the particular usages of each lordship constituted the civil law. Every lordship had its civil law, according to Beaumanoir *, and so particular a law, that this author who is looked upon as a luminary, and a very great luminary, of those times, says he, does not believe that, throughout the whole kingdom, there were two lordships entirely governed by the same law.

This prodigious diversity had a first and second origin. With regard to the first, the reader may recollect what has been already said concerning it in the † chapter of local customs; and as to the second, we meet with it in the different events of legal duels; it being natural that a continual series of fortuitous cases must have been productive of new usages.

These customs were preserved in the memory of old men; but insensibly laws or written customs

were formed.

the kings gave not only particular charters, but likewise general ones, in the manner above explained; such are the institutions of Philip Augustus, and those made by St. Lewis. In like manner the

* Prologue to the custom of Beauvoisis. + Chap. 12. † See the collection of ordinances by Lauriere.

great

great vassals, in concurrence with the lords who held under them, granted certain charters or establishments, according to particular circumstances, at the affizes of their duchies or counties: Such were the affize of Godfrey Count of Britanny, on the division of the nobles; the customs of Normandy, granted by Duke Ralph; the customs of Champagne, given by king Theobald; the laws of Simon count of Montfort, and others. This produced some written laws, and even more general ones than those they had before.

2. At the beginning of the third race, almost all the common people were bondmen; but there were several reasons which determined afterwards the

kings and lords to enfranchise them.

The lords, by enfranchifing their bondmen, gave them property; it was necessary therefore to give them civil laws, in order to regulate the disposal of that property. The lords, by enfranchifing their bondmen, deprived themselves of their property; there was a necessity therefore of regulating the rights which they reserved to themselves, as an equivalent for that property. Both these things were regulated by the charters of enfranchisement; those charters formed a part of our customs, and this part was reduced to writing.

3. Under the reign of St. Lewis, and of the sucteeding princes, some able practitioners, such as Defontaines, Beaumanoir, and others, committed the customs of their baliwics to writing. Their design was rather to give the course of judicial proceedings, than the usages of their time, in respect to the disposal of property. But the whole is there; and though these particular authors have no authority but what they derive from the truth and notoriety of the things they speak of, yet there is no manner of doubt but they contributed greatly to the restoration of our ancient French law. Such was in those days our common law.

Sf2

We are come now to the grand epocha. Charles VII. and his fucceffours caused the different local customs throughout the kingdom to be reduced to writing, and prescribed set forms to be observed at their digesting. Now, as this digesting was made through all the provinces, and as people came from each lordship to declare in the general affembly of the province, the written or unwritten usages of each place, endeavours were used to render the customs more general, as much as possible, without injuring the interests of individuals, which were carefully * preserved. Thus our customs assumed three characters; they were committed to writing, they were made more general, and they received the stamp of the royal authority.

Many of these customs having been digested anew, several changes were made, either in suppressing whatever was incompatible with the actual practice of the law, or in adding several things

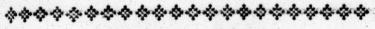
drawn from this practice.

Though the common law is confidered amongst us as in some measure opposite to the Roman, infomuch that these two laws divide the different territories; it is notwithstanding true, that several regulations of the Roman law entered into our customs, especially when they made the new digests at a period of time not very distant from ours; when this law was the principal study of all those who were defigned for civil employments; at a time when it was not usual for people to boast of not knowing what it was their duty to know, and of knowing what they ought not to know; at a time when a quickness of understanding was made more subservient towards learning than pretending to a profession, and when a continual pursuit of amusements was not even the characteristic of-women.

What has been hitherto faid of the formation of

^{*} This was observed at the digesting of the customs of Berry and of Paris. See la Thaumassiere, chap. 3.

our civil laws, feems to lead me naturally to give also the theory of our political laws; but this would be too great a work. I am like that antiquarian who set out from his own country, arrived in Egypt, cast an eye on the pyramids, and returned home.



BOOK XXIX.

Of the Manner of composing Laws.

CHAP. I.

Of the Spirit of the legislator.

I Say it, and methinks I have undertaken this work with no other view than to prove it: The spirit of moderation ought to be that of the legislator; political, like moral evil, lying always between two extremes. Let us produce an example.

The fet forms of justice are necessary to liberty; but the number of them might be so great as to be contrary to the end of the very laws that established them; processes would have no end; property would be uncertain; the goods of one of the parties would be adjudged to the other without examining, or they would both be ruined by examining too much.

The citizens would lose their liberty and security; the accusers would no longer have any means to convict; nor the accused to justify themselves.

CHAP. II.

The same subjest continued.

CÆCILIUS, in Aulus Gellius *, speaking of the law of the twelve tables, which permitted

^{*} Book xx. chap. r.

the creditor to cut the infolvent debtor into pieces, justifies it even by its cruelty, which * hindered people from borrowing beyond their abilities. Shall then the cruelest laws be the best? Shall goodness consist in excess, and all the relations of things be destroyed?

CHAP. III.

That the laws which feem to deviate from the views of the legislator, are frequently agreeable to them.

THE law of Solon, which declared those perfons infamous who espoused no side in an infurrection, seemed very extraordinary; but we ought to consider the circumstances in which Greece was at that time. It was divided into very small states: And there was reason to apprehend, lest in a republic, torn by intestine divisions, the soberest part should keep retired, and things by

this means should be carried to extremity.

In the feditions raised in those petty states, the bulk of the citizens either made or engaged in the quarrel. In our large monarchies, parties are formed by a few, and the people chuse to live quiet. In the latter case it is natural to call back the seditious to the bulk of the citizens, and not these to the seditious; in the other, it is necessary to oblige the small number of prudent people to enter among the seditious: It is thus the sermentation of one liquor may be stopt by a single drop of another.

* Cæcilius fays, that he never faw nor read of an instance, in which this punishment had been inslicted; but it is likely, that no such punishment was ever established; the opinion of some civilians, that the law of the twelve tables meant only the division of the money arising from the sale of the debtor, seems very probable.

CHAP.

CHAP. IV.

Of the laws that are contrary to the views of the legislator.

THERE are laws so little understood by the legislator, as to be contrary to the very end he proposed. Those who made this regulation among the French, that when one of the two competitors died, the benefice should devolve to the survivor, had in view without doubt the extinction of quarrels: But the very reverse falls out; we see the clergy at variance every day, and like English massifists worrying one another to death.

CHAP. V.

The same subject continued.

THE law I am going to speak of, is to be found in this oath preserved by Æschines * : I swear that I will never destroy a town of the AmphiElyons. and that I will not divert the course of its running waters; if any nation shall presume to do such a thing, I will declare war against them, and will destroy their towns. The last article of this law, which seems to confirm the first, is really contrary to it. Amphictyon is willing that the Greek towns should never be destroyed, and yet his law paves the way for the destruction of these towns. In order to establish a proper law of nations among the Greeks, they ought to have been accustomed early to think it a barbarous thing to destroy a Greek town; confequently they ought not even to destroy the destroyers. Amphictyon's law was just; but it was not prudent: This appears even from the abuse

^{*} De falsa legatione.

made of it. Did not Philip affume the power of destroying towns, under the pretence of their having infringed the laws of the Greeks? Amphictyon might have inflicted other punishments; he might have ordained, for example, that a certain number of the magistrates of the destroying town, or of the chiefs of the infringing army, should be punished with death; that the destroying nation should cease for a while to enjoy the privileges of the Greeks; that they should pay a fine till the town was rebuilt. The law ought above all things to aim at the reparation of damages.

CHAP. VI.

That laws which appear the same, have not always the same effect.

ÆSAR made a law * to prohibit people from keeping above fixty festerces in their houses. This law was confidered at Rome as extremely proper for reconciling the debtors to their creditors; because by obliging the rich to lend the poor, they enabled the latter to pay their debts. A law of the fame nature made in France at the time of the fystem, proved extremely fatal; because it was enacted under a most frightful circumstance. After depriving people of all possible means of laying out their money, they stripped them even of the last resource of keeping it at home; which, was the fame thing as taking it from them by open violence. Cæsar's law was designed to make the money circulate; the French minister's design was to draw all the money into one hand. The former gave either lands or mortgages on private people for the money; the latter proposed in lieu of money nothing but effects, which were of no value, and

^{*} Dio, lib. 41.

could have none by their very nature, because the law compelled people to accept of them.

CHAP. VII.

The same subject continued. The necessity of composing laws in a proper manner.

THE law of ostracism was established at Athens, at Argos *, and at Syracuse. At Syracuse it was productive of a thousand mischiefs, because it was imprudently enacted. The principal citizens banished one another by holding the leaf of a figtree † in their hands; so that those who had any kind of merit withdrew from public affairs. At Athens, where the legislator was sensible of the proper extent and limits of his law, ostracism proved an admirable thing: They never condemned more than one person at a time; and such a number of suffrages were requisite for passing this sentence, that it was extremely difficult for them to banish a person whose absence was not necessary to the state.

The power of banishing was exercised only every fifth year: In fact, as the oftracism was designed against none but great personages who threatened the state with danger, it ought not to be the transaction of every day.

CHAP. VIII.

That laws which appear the same were not always made through the same motive.

IN France they have received most of the Roman laws on substitutions, but through quite a dif-

^{*} Aristot. rep. lib. v. chap. 3. † Plutarch, life of Dionysius.

ferent motive from the Romans. Among the latter the inheritance was accompanied with certain * facrifices, which were to be performed by the inheritor, and were regulated by the pontifical law; hence it was, that they reckoned it a dishonour to die without heirs, that they made slaves their heirs, and that they devised substitutions. Of this we have a very strong proof in the vulgar substitution, which was the first invented, and took place only when the heir appointed did not accept of the inheritance. Its view was not to perpetuate the estate in a family of the same name, but to find somebody that would accept of it.

CHAP. IX.

That the Greek and Roman laws punished suicide, but not through the same motive.

A Man, fays Plato †, who has killed one nearly related to him, that is, himself, not by an order of the magistrate, nor to avoid ignominy, but through faint-heartedness, shall be punished. The Roman law punished this action when it was not committed through faint-heartedness, through weariness of life, through impatience in pain, but through a criminal despair. The Roman law acquitted where the Greek condemned, and condemned where the other acquitted.

Plato's law was formed upon the Lacedæmonian institutions, where the orders of the magistrate were absolute, where shame was the greatest of miseries, and faint-heartedness the greatest of crimes. The Romans had no longer those fine

ideas; theirs was only a fiscal law.

* When the inheritance was too much incumbered, they eluded the pontifical law by certain fales, from whence comes the word fine facris kereditas.

+ Book ix, of laws.

During the time of the republic there was no law at Rome against suicide: This action is always considered by their historians in a favourable light, and we never meet with any punishment inflicted

upon those who committed it.

Under the first emperours, the great families of Rome were continually destroyed by criminal prosecutions. The custom was then introduced of preventing judgement by a voluntary death. In this they found a great advantage: They had * an honourable interment, and their wills were executed; because there was no law against suicides. But when the emperours became as avaricious as cruel, they deprived those who destroyed themselves of the means of preserving their estates, by rendering it criminal for a person to make away with himself through a criminal remorse.

What I have been faying of the motive of the emperours, is so true, that they consented + that the estates of suicides should not be confiscated, when the crime for which they killed themselves

was not punished with confiscation.

CHAP. X.

That laws which feem contrary, proceed sometimes from the same spirit.

IN our times we give fummons to people in their own houses; but this was not permitted ‡ among the Romans.

* Eorum qui de se statuebant humabantur corpora, manebant testamenta, pretium sessinandi. Tacit.

† Rescript of the emperour Pius in the 3d law, § 1, & 2 ff. de bonis eorum qui ante sent. mortem sibi consciverunt.

‡ Leg. 18. ff. de in jus vocando.

A fummons was a violent * action, and a kind of warrant for feizing the + body; hence it was no more allowed to fummon a person in his own house, than it is now allowed to arrest a person in his own house for debt.

Both the Roman ‡ and our laws admit of this principle alike, that every man ought to have his own house for an asylum, where he should suffer

no violence.

CHAP. XI.

How we are to judge of the difference of laws.

IN France, the punishment against false witneffes is capital; in England it is not. Now, to be able to judge which of these two laws is the best, we must add, that in France the rack is used against criminals, but not in England; that in France the accused is not allowed to produce his witnesses; and that they very seldom admit of what is called justifying facts; in England they allow of witnesses on both sides. These three French laws form a close and wellconnected fystem; and so do the three English laws. The law of England, which does not allow of the racking of criminals, has but very little hopes to draw from the accused a confession of his crime; for this reason it invites witnesses from all parts, and does not venture to discourage them by the fear of a capital punishment. The French law, which has one resource more, is not afraid of intimidating the witnesses; on the contrary, reason requires they should be intimidated; it listens only

* See the law of the twelve tables.

[†] Rapit in jus, Horace, fat. 9. Hence they could not fummon those to whom a particular respect was due.

[†] See the law 18. ff. de in jus vocando.

to the witnesses on one side *, which are those produced by the attorney-general, and the fate of the accused depends intirely on their testimony. But in England they admit of witnesses on both sides, and the affair is discussed in some measure between them; consequently false witness is there less dangerous, the accused having a remedy against the false witnesses, which he has not in France.—Wherefore, to determine which of those laws are most agreeable to reason, we must not consider them singly, but compare the whole together.

CHAP. XII.

That laws which appear the same are sometimes really different.

THE Greek and Roman laws inflicted the same † punishment on the receiver as on the thies: The French law does the same. The former acted rationally, but the latter does not. Among the Greeks and Romans, the thies was condemned to a pecuniary punishment, which ought also to be inflicted on the receiver: For every man that contributes in what shape soever to a damage, is obliged to repair it. But as the punishment of thest is capital with us, the receiver cannot be punished like the thies, without carrying things to excess. A receiver may act innocently on a thousand occasions; the thies is always culpable; one hinders the conviction of a crime, the other commits it; in one the whole is passive, the other is active; the

† Leg. 1. de receptatoribus.

^{*} By the ancient French law, witnesses were heard on both sides; hence we find in the institutions of St. Lewis, book i. chap. 7. that there was only a pecuniary punishment against false witnesses.

thief must furmount more obstacles, and his foul

must be more hardened against the laws.

The civilians have gone further; they look upon the receiver as more odious than the * thief; for were it not for the receiver, the theft, fay they, could not be long concealed. But this again might be right when there was only a pecuniary punishment; the affair in question was a damage done, and the receiver was generally better able to repair it; but when the punishment became capital, they ought to have been directed by other principles.

CHAP. XIII.

That we must not separate the laws from the end for which they were made: Of the Roman laws on thest.

WHEN a thief was caught with the stolen thing before he had carried it to the place where he designed to hide it, this was called by the Romans an open thest; when he was not detected till some time afterwards, it was a private thest.

The law of the twelve tables ordained, that an open thief should be whipt with rods, and condemned to slavery, if he had attained the age of puberty; or only whipt, if he was not of ripe age; but as for the private thief, he was only condemned to a recompense of double the value of what he had stolen.

When the Porcian law abolished the custom of whipping the citizens with rods, and of reducing them to slavery, the open thief was condemned to † a recompense of fourfold, and they still continu-

^{*} See what Favorinus fays in Aulus Gellius, book xx. chap. 1.

ed to condemn the private thief to a recompense of double.

It feems very odd, that thefe laws should make fuch a difference in the quality of those two crimes, and in the punishments they inflicted. In fact. whether the thief was detected either before or after he had carried the ftolen goods to the place intended, this was a circumstance which did not alter the nature of the crime. I do not at all queftion but the whole theory of the Roman laws in relation to theft was borrowed from the Lacedæmonian institutions. Lycurgus, with a view of rendering the citizens dexterous and cunning, ordained that children should be practifed in thieving, and that those who were caught in the fact should be severely whipt: This occasioned among the Greeks, and afterwards among the Romans, a great difference between an open and a private theft *.

Among the Romans, a flave who had been guilty of stealing, was thrown from the Tarpeian rock. Here the Lacedæmonian institutions were out of the question; the laws of Lycurgus in relation to thest were not made for slaves; to deviate from them in this respect was in reality conforming to them.

At Rome, when a person of unripe age happened to be caught in the fact, the prætor ordered him to be whipt with rods according to his pleafure, as was practised at Sparta. All this had a remoter origin. The Lacedæmonians had derived these usages from the Cretans; and Plato +, who wants to prove that the Cretan institutions were designed for war, cites the following, namely, the

^{*} Compare what Plutarch fays in the life of Lycurgus with the laws of the digest, title de furtis; and the Institutes, book iv. tit. 1. § 2, & 3.

[†] Of laws, book i.

faculty of bearing pain in private combats, and in

punishments inflicted for open thefts.

As the civil laws depend on the political institutions, because they are made for the same society; whenever there is a design of adopting the civil law of another nation, it would be proper to examine beforehand, whether they have both the same in-

flitutions, and the same political law,

Thus when the Cretan laws on theft were adopted by the Lacedæmonians, as their constitution and government were adopted at the same time, these laws were equally reasonable in both nations. But when they were carried from Lacedæmon to Rome, as they did not find there the same constitution, they were always thought strange, and had no manner of connection with the other civil laws of the Romans.

CHAP. XIV.

That we must not separate the laws from the circumstances in which they were made,

IT was decreed by a law at Athens, that when the city was befieged, all the useless people should be put to death *. This was an abominable political law, in consequence of an abominable law of nations. Among the Greeks the inhabitants of a town taken, lost their civil liberty, and were sold as slaves. The taking of a town implied its entire destruction; which is the source not only of those obstinate defences, and of those unnatural actions, but likewise of those shocking laws which they sometimes enacted.

The Roman laws + ordained that physicians

^{*} Inutilis ætas occidatur. Syrian. in Hermog. † The Cornelian law de sicariis, Institut. lib. iv. tit. 3. de lege Aquilia, § 7.

should be punished for neglect or unskilfulness. In those cases, if the physician was a person of any fortune or rank, he was only condemned to deportation; but if he was of a low condition, he was put to death. By our laws it is otherwise. The Roman laws were not made under the same circumstances as ours: At Rome every ignorant pretender intermeddled with physic; but amongst us, physicians are obliged to go through a regular course of study, and to take their degrees: For which reason they are supposed to understand their art.

CHAP. XV.

That sometimes it is proper the law should amend itself.

THE law of the twelve tables * allowed people to kill a night-thief as well as a day-thief, if upon being purfued he attempted to make a defence: But it required, that the person who killed the thief +, should cry out, and call his fellowcitizens; this is what those laws, which permit people to do justice to themselves, ought always to require. It is the cry of innocence, which, in the very moment of the action, calls in witnesses, and appeals to judges. The people ought to take cognizance of the action, and at the very instant of its being done; an instant when every thing speaks, the air, the countenance, the passions, filence; and when every word either condemns or absolves. A law which may become fo contrary to the fecurity and liberty of the citizens, ought to be executed in their presence.

^{*} See the the 4th law, ff. ad leg. Aquil.
† Ibidem. See the decree of Taffillon, added to
the law of the Bavarians de popularib. legib. art. 4.
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CHAP. XVI.

Things to be observed in the composing of laws.

THOSE who have a genius sufficient to enable them to give laws to their own, of to another nation, ought to be particularly attentive to the

manner of forming them.

The style ought to be concise. The laws of the twelve tables are a model of conciseness; the very children * used to learn them by heart. Justinian's Novels were so very diffused, that they were obli-

ged to abridge them +.

The style should also be plain and simple; a direct expression being always better understood than an indirect one. There is no majesty at all in the laws of the lower empire: Princes are made to speak like rhetoricians. When the style of laws is tumid, they are looked upon only as a work of parade and oftentation.

It is an effential article, that the words of the laws should excite in every body the same ideas. Cardinal Richelieu ‡ agreed, that a minister might be accused before the king; but he would have the accuser punished, if the facts he proved were not matters of moment. This was enough to hinder people from telling any truth whatsoever against the minister; because a matter of moment is entirely relative, and what may be of moment to one, is not so to another.

The law of Honorius punished with death any person that purchased a freedman as a slave, or

^{*} Ut carmen necessarium. Gicero de legib. lib. ii.

[†] It is the work of Irnerius. † Political Testament.

that * gave him moleftation. He should not have made use of so vague an expression: The molestation given to a man depends entirely on the degree

of his fenfibility.

When the law wants to fix a fet rate upon things, it should avoid as much as possible the valuing it in money. The value of money changes from a thousand causes, and the same denomination continues without the same thing. Every one knows the story of that impudent † fellow at Rome, who used to give those he met a box on the ear, and afterwards tendered them the five and twenty pence of the law of the twelve tables.

When a law has once fixed the ideas of things, it should never return to vague expressions. In the criminal ordinance of Lewis XIV. ‡ after an exact enumeration of the causes in which the king is immediately concerned, follows these words, and those which in all times have been subject to the determination of the king's judges, which renders the thing again arbitrary, after it had been fixed.

Charles VII. I fays, he has been informed that the parties appeal three, four, and fix months after judgement, contrary to the custom of the kingdom in the country governed by custom; he therefore ordains that they shall appeal forthwith, unless there happens to be some fraud or deceir in the attorney so or unless there be a great or evident

^{*} Aut qualibet manumissione donatum inquietate voluerit. Appendix to the Theodosian code, in the first volume of Father Sirmond's works, p. 737.

[†] Aulus Gellius, book xx chap. 1.

[‡] We find in the verbal process of this ordinance the motives that determined him.

In his ordinance of Montel-les-tours, in the year

[§] They might punish the attorney, without there being any necessity of disturbing the public order.

cause to sue the appeal. The end of this law destroys the beginning, and it destroys it so effectually, that they used afterwards to appeal during

the space of thirty years *.

The law of the Lombards + does not allow a woman that has taken a religious habit, though she has made no vow, to marry; because, says this law, if a spouse who has been contracted to a woman only by a ring, cannot without guilt be married to another; by a much stronger reason the spouse of God, or of the blessed Virgin. . . . Now I say, that in laws the arguments should be drawn from one reality to another, and not from reality to sigure, or from sigure to reality.

A law enacted by Constantine ‡ ordains, that the fingle testimony of a bishop should be sufficient without listening to any other witnesses. This prince took a very short method; he judged of affairs by persons, and of persons by dignities.

The laws ought not to be fubtile; they are defigned for people of common understanding, not as an art of logic, but as the plain reason of a sa-

ther of a family.

When there is no necessity for exceptions and limitations in a law, it is much better to omit them: details of that kind throw people into new details.

No alteration should be made in a law without sufficient reason. Justinian ordained, that a husband might be repudiated, without the wife's losing her portion, if for the space | of two years he had been incapable of consummating the marriage. He

+ Book ii. tit. 37.

^{*} The ordinance of the year 1667, had made some regulations upon this head.

[†] In Father Simon's appendix to the Theodosian code, tome 1.

[|] Leg. 1. code de repudiis.

altered this law afterwards, and allowed the * poor wretch three years. But in a case of that nature, two years are as good as three, and three are not worth more than two.

When a legislator condescends to give the reason of his law, it ought to be worthy of its majesty. A Roman † law decrees, that a blind man is incapable to plead, because he cannot see the ornaments of the magistracy. So bad a reason must have been given on purpose when such a number of good reasons were at hand.

Paul the civilian ‡ fays, that a child grows perfect in the feventh month, and that the proportion of Pythagoras's numbers feems to prove it. It is very extraordinary that they should judge of those things by the proportion of Pythagoras's numbers.

Some French lawyers have afferted, that when the king made an acquisition of a new country, the churches became subject to the regale, because the king's crown is round. I shall not examine here into the king's rights, or whether in this case the reason of the civil or ecclesiastic law ought to submit to that of the law of politics: I shall only say, that those august rights ought to be defended by grave maxims. Was there ever such a thing known, as the real rights of a dignity, founded on the figure of that dignity's sign?

Davila | fays, that Charles IX. was declared of age in the parliament of Rouen at fourteen years commenced, because the laws require every moment of the time to be reckoned, in cases relating to the restitution and administration of an orphan's estate; whereas it considers the year commenced as

^{*} See the authentic Sed hodie, in the code de re-

[†] Leg. 1. ff. de postulando.

In his fentences, book i. tit. 9.

Della guerra civile di Francia, page 96.

a year complete, when the case is concerning the acquisition of honours. I am very far from censuring a regulation which has been hitherto attended with no inconveniency; I shall only take notice
that the reason alleged * is not the true one; it is
false, that the government of a nation is only an
honour.

In point of prefumption, that of the law is far preferable to that of the man. The French law † confiders every act of a merchant during the ten days preceding his bankruptcy as fraudulent: This is the prefumption of the law. The Roman law inflicted punishments on the husband who kept his wife after she had been guilty of adultery, unless he was induced to it through fear of the event of a law-suit, or through contempt of his own shame; this is the presumption of the man. The judge must have presumed the motives of the husband's conduct, and must have determined a very obscure and ambiguous point: When the law presumes, it gives a fixed rule to the judge.

Plato's law, as I have observed already, required that a punishment should be inflicted on the person that killed himself, not with a design of avoiding shame, but through faint-heartedness. This law was desective in this respect, that in the only case in which it was impossible to draw from the criminal an acknowledgement of the motive upon which he had acted, it required the judge to determine

concerning these motives.

As useless laws debilitate such as are necessary, so those that may be easily eluded, weaken the legislation. Every law ought to have its effect, and no one should be ever suffered to deviate from it by a particular convention.

The Falcidian law ordained among the Romans,

* The Chancellour de l'Hôpital, ib.

[†] It was made in the month of November 1702.

that the heir should always have the fourth part of the inheritance: Another law * suffered the testator to prohibit the heir from retaining this fourth part. This is making a jest of the laws. The Falcidian law became useless; for, if the testator had a mind to favour his heir, the latter had no need of the Falcidian law; and if he did not intend to savour him, he forbade him to make use of the Falcidian law.

Care should be taken that the laws be worded in such a manner, as not to be contrary to the very nature of things. In the proscription of the Prince of Orange, Philip II. promises to any man that will kill the Prince, to give him or his heirs five and twenty thousand crowns, together with the title of nobility; and this upon the word of a king, and as a servant of God. To promise nobility for such an action! To ordain such an action in the quality of a servant of God! This is equally subversive of the ideas of honour, morality, and religion.

There very feldom happens to be a necessity of prohibiting a thing which is not bad, under pre-

tence of fome imaginary perfection.

There ought to be a certain simplicity and candour in the laws: Made to punish the iniquity of men, they themselves ought to have the most spotless innocence. We find in the law of the † Visigoths that ridiculous request, by which the Jews were obliged to eat every thing dressed with pork, provided they did not eat the pork itself. This was a very great cruelty; they were obliged to submit to a law contrary to their own; and they were allowed to retain nothing more of their own, than what might serve as a mark to distinguish them.

+ Book xii. tit. 2. § 16.

^{*} It is the authentic. Sed cum testator.

CHAP. XVII.

A bad method of giving laws.

THE Roman emperours manifested their will like our princes, by decrees and edicts; but they permitted, which our princes do not do, both the judges and private people, to interrogate them by letters in their feveral differences; and their an-Iwers were called referipts. The decretals of the popes are referipts, strictly speaking. It is plain, that this is a bad method of legislation. Those who thus apply for laws are bad guides to the legiflator; the facts are always wrong stated. Julius Capitolinus * fays, that Trajan often refused to give this kind of rescripts, left a fingle decision, and frequently a particular favour, should be extended to all cases. Macrinus + had resolved to abolish all those rescripts; he could not bear that the answers of Commodus, Caracalla, and all those other ignorant princes, should be considered as laws. Justinian thought otherwise, and he filled his compilement with them.

I would advise those who read the Roman laws, to distinguish carefully between this kind of hypotheses, and the fenatusconfulta, the plebiscita, the general constitutions of the emperours, and all the laws founded on the nature of things, on the frailty of women, the weakness of minors, and the

public utility.

CHAP. XVIII.

Of the ideas of uniformity.

THERE are certain ideas of uniformity, which fometimes strike great geniuses, (for they even * See Julius Capitolinus in Macrino. † Ibid. affected

affected Charlemagne), but infallibly make an impression on little souls. They discover therein a kind of perfection, because it is impossible for them not to discover it; the same weights in the police, the fame measures in commerce, the same laws in the state, the same religion in all its parts. But is this always right, and without exception? Is the evil of changing always less than that of suffering? And does not a greatness of genius consist rather in distinguishing between those cases in which uniformity is requifite, and those in which there is a necesfity for differences? In China the Chinese are governed by the Chinese ceremonial; and the Tartars by theirs: And yet there is no nation in the world that aims fo much at tranquillity. If the people observe the laws, what fignifies it whether these laws are the same?

CHAP. XIX.

Of legislators.

A RISTOTLE wanted to fatisfy, fometimes his jealoufy against Plato, and sometimes his passion for Alexander. Plato was incensed against the tyranny of the people of Athens. Machiavel was full of his idol, the Duke of Valentinois. Sir Thomas Moor, who spake rather of what he had read than of what he thought, wanted * to govern all states with the simplicity of a Greek city. Harrington was full of the idea of his savourite republic of England, whilst a croud of writers saw nothing but consusion where they saw no crown. The laws always meet the passions and prejudices of the legislator; sometimes they pass through, and imbibe only a tincture; sometimes they stop, and are incorporated with them.

^{*} In his Utopia. Vol. II.

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BOOK XXX.

Theory of the feudal laws among the Franks, in the relation they bear to the establishment of the monarchy.

CHAP. I.

Of foudal laws.

I Should think my work imperfect, were I to pass over in filence an event which happened once, and never, perhaps, will happen more: Were I not to speak of those laws which appeared of a sudden all over Europe, without having any connection with those hitherto known; of those laws which have done infinite good and infinite mifchief; which have left rights when the demesne has been ceded; which by vefting feveral persons with different kinds of feigniory over the same things or perfons, have diminished the weight of the whole feigniory; which have established different limits in empires of two great an extent; which have been productive of rule with an inclination to anarchy, and of anarchy with a tendency to order and harmony.

This would require a particular work to itself; but considering the nature of the present undertaking, the reader will here meet rather with a general survey, than with a complete treatise of those

laws.

The feudal laws form a very beautiful prospect. A venerable old * oak raises its losty head to the

Æthereas, tantum radice at Tartara tendit.

fkies; the eye fees from afar its spreading leaves: Upon drawing nearer it perceives the trunk, but does not discern the root; the ground must be dug up to discover it.

CHAP. II.

Of the fource of feudal laws.

THE conquerours of the Roman empire came from Germany. Though few ancient authors have described their manners, yet we have two of very great weight. Cæsar, making war against the Germans, described the manners * of that nation; and upon these he regulated † some of his enterprises. A few pages of Cæsar upon this subject are equal to whole volumes.

Tacitus has wrote an entire work on the manners of the Germans. This work is short; but it comes from the pen of Tacitus, who was always concise, because he saw every thing at one glance.

These two authors agree so perfectly with the codes still extant of the laws of the Barbarians, that reading Cæsar and Tacitus, we imagine we are reading these codes; and, in reading these codes, we fancy we are reading Cæsar and Tacitus.

But if in the refearch of the feudal laws, I find myself in a dark labyrinth, full of windings and detours, I think I have the clue in my hand, and that I shall be able to find my way through.

^{*} Book vi.

for instance, his retreat from Germany. Ibid.

CHAP. III.

The origin of vassalage.

CÆfar * fays, " That the Germans neglected a-" griculture, that the greatest part of them " lived upon milk, cheefe, and flesh; that no one " had lands or boundaries of their own: that " the princes and magistrates of each nation " allotted what portion of land they pleased, and where they pleased, to every individual, and obliged them the year following to remove elfe-" where." Tacitus fays +, " That each prince had " a multitude of men, who were attached to his " fervice, and followed him wherever he went." This author gives them a name in his language relative to their state, which is that of companions ‡. They had a strong emulation to distinguish themfelves in the princes esteem; and the princes had the fame emulation to diftinguish themselves in the bravery and number of their companions. " Their " dignity and power," continues Tacitus, " con-" fifts in being constantly surrounded with a mul-" titude of young and chosen people : this they " reckon an ornament in peace, a defence and fupof port in war. Their name becomes famous at " home, and among neighbouring nations, when " they excel all others in the number and courage " of their companions: they receive prefents and " embaffies from all parts. Reputation frequently " decides the fate of war. In battle it is infamy in " the prince to be furpaffed in courage; it is infa-" my in the companions not to follow the brave

^{*} Book 6. of the Gallie wars. Tacitus adds, Nulli domus aut ager, aut aliqua cura; prout ad quem venere aluntur. De moribus German.

[&]quot; example

"example of their prince; it is an eternal disgrace to survive him. To defend him is their most facred engagement. If a city is at peace, the princes go to those who are at war; and it is by this means they retain a great number of friends, To these they give the war-horse and the terrible javelin. Their pay consists in coarse, but large repasts. The prince supports his liberality merely by war and plunder. You might easier pursuade them to challenge the enemy, and to expose themselves to wounds, than to cultivate the land, and to attend the cares of husbandry; they refuse to acquire by sweat what they can purchase with blood."

Thus, among the Germans there were vaffals, but no fiefs; they had no fiefs, because the princes had no lands to give; or rather their fiefs consisted in horses trained for war, in arms, and feasting. There were vaffals, because there were trusty men who were bound by their word, who were engaged to follow the prince to the field, and performed very near the same service as was afterwards per-

formed for the fiefs.

CHAP. IV.

The same subject continued.

CÆsar || says, that, "when any of the princes "declared to the assembly that he intended to set out upon some expedition, and asked them to follow him; those who approved the leader, and the enterprise, stood up and offered their assistance. Upon which they were commended by the multitude. But if they did not suissi their

De bello Gallico, lib. 6.

" engagements, they lost the public esteem, and were looked upon as deserters and traitors."

What Cæsar says in this place, and what we have extracted in the preceding chapter from Tacitus, is the foundation of the history of our princes of the first race.

We must not therefore be surprised, that our kings should have new armies to raise upon every expedition, new troops to perfuade, new people to engage; that to acquire much, they were obliged to spend a great deal; that they should incessantly acquire by the division of lands and spoils, and give these lands and spoils incessantly away; that their demesne should continually increase and diminish; that a father, upon giving a kingdom # to one of his children, should always accompany it with a treasure; that the king's treasure should be considered as neceffary to the monarchy; and that one * king could not give part of it to strangers, even in portion with his daughter, without the The monarchy moved confent of the other kings. by fprings, which they were constantly obliged to wind up.

CHAP. V.

Of the conquests of the Franks.

IT is not true, that the Franks, upon entering Gaul, took possession of all the country to turn it into siefs. This has been the opinion of some

See the life of Dagobart.

* See Gregory of Tours, book 6, on the marriage of the daughter of Chilpéric. Childebert sends ambafiadours to tell him, that he should not give the cities of his father's kingdom to his daughter, nor his treafures, nor his bondmen, nor horses, nor horsemen, nor teams of oxen, &c.

people,

people, because they saw almost all the country, towards the end of the second race, converted into siefs, rear-siefs, or other dependencies; but this was owing to particular causes, which we shall ex-

plain hereafter.

The consequence which some would infer from thence, that the barbarians made a general regulation for establishing in all parts the state of villanage, is not less false than the principle. If at a time when the siefs were precarious, all the lands of the kingdom had been siefs or dependencies of siefs, and all the men in the kingdom vasfals, or bondmen subordinate to vasfals; as the person that has property is always possessed of power, the king, who continually disposed of the siefs, that is of the only property then existing, would have been possessed of as arbitrary a power as the Grand Seignior is in Turky; which is absolutely contradictory to all history.

CHAP. VI.

Of the Goths, Burgundians, and Franks.

GAul was invaded by German nations. The Vifigoths took possession of the province of Narbonne, and of almost all the south; the Burgundians settled in the east; and the Franks sub-

dued very near all the reft.

No doubt but these barbarians retained in their respective conquests the manners, inclinations, and usages of their own country; for no nation can change in an instant their manner of thinking and acting. These people in Germany neglected agriculture. It seems by Cæsar and Tacitus, that they applied themselves greatly to a pattoral life: hence the regulations of the codes of barbarian laws are almost all relating to their flocks. Roricon, who wrote a history among the Franks, was a shepherd.

CHAP.

CHAP. VII.

Different ways of dividing the lands.

A Fter the Goths and Burgundians had, under various pretences, penetrated into the heart of the empire, the Romans, in order to put a stop to their devastations, were obliged to provide for their subsistence. At first they allowed them † corn; but, afterwards, they chose to give them lands. The emperors, or the Roman ‡ magistrates in their name, made particular conventions with them concerning the division of lands, as we find by the chronicles and in the codes of the Visigoths | and Burgundians §.

The Franks did not follow the same plan. In the Salic and Ripuarian laws we find not the least vestige of any such division of lands; they had conquered the country, and so took what they pleased, making no regulations but amongst them-

felves.

Let us therefore distinguish between the conduct of the Burgundians and Visigoths in Gaul, of those same Visigoths in Spain, of the * auxiliary troops under Augustulus and Odoacer in Italy, and that

+ The Romans obliged themselves to this by treaties.

† Burgundiones partem Galliæ occuparunt, terrafque cum Gallicis fenatoribus diviferunt. Marius's chronicle, in the year 456.

| Book 10. tit. 1. § 8. 9. and 16.

Chap. 54. § 1. and 2. This division was still subfisting in the time of Lewis le Debonnaire, as appears by his capitulary of the year 829, which has been inserted in the law of the Burgundians, tit. 79. § 1.

* See Procopius, war of the Goths.

of the Franks in Gaul, and of the Vandals † in Africa. The former entered into conventions with the ancient inhabitants, and, in confquence thereof, made a division of lands between them; the latter did no such thing.

CHAP. VIII.

The same subject continued.

What has induced some people to think that the Roman lands were entirely usurped by the Barbarians, is their finding in the laws of the Visigoths and Burgundians, that these two nations had two thirds of the lands: but this they took only

in certain quarters affigned them.

Gundebald ‡ says, in the law of the Burgundians, that his people at their establishment had two thirds of the lands allowed them; and the second supplement | to this law takes notice, that only a moiety would be allowed to those who should hereaster come to live in that country. Therefore all the lands had not been divided in the beginning between the Romans and the Burgundians.

In the texts of those two regulations we meet with the same expressions; consequently they explain one another, and as the second they cannot be understood to mean an universal division of lands, neither can this signification be given to the

first.

The Franks acted with the same moderation as

† See Procopius, war of the Vandals.

‡ Licet eo tempore quo populus noster mancipiorum tertiam et duas terrarum partes accepit, &c. Law of

the Burgundians, tit. 54. § 1.

Ut non amplius a Burgundionibus qui infra venerunt requiratur, quam ad præsens necessitas fuerit, medietas terræ. Art. 11.

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wherever they extended their conquests. What would they have done with so much land? They took what suited them, and left the rest.

CHAP. IX.

A just application of the law of the Burgundians, and of that of the Visigoths, in relation to the division of lands.

IT is to be confidered that those divisions of land were not made with a tyrannical spirit; but with a view of relieving the reciprocal wants of two nations that were to inhabit the same country.

The law of the Burgundians ordains that a Burgundian shall be received in an hospitable manner by a Roman. This is agreeable to the manners of the Germans, who, according to Tacitus ||, were

the most hospitable people in the world.

By the law of the Burgundians it is ordained, that the Burgundians shall have two thirds of the lands and one third of the bondmen. In this it considered the genius of the two nations, and conformed to the manner in which they procured their subsistence. As the Burgundians dealt chiefly in cattle, they wanted a great deal of land and few bondmen; and the Romans, from their application to agriculture, had need of less land and of a greater number of bondmen. The woods were equally divided, because their wants in this respect were the same.

We find in the code § of the Burgundians, that each barbarian was placed near to a Roman. The division therefore was not general; but the Romans,

^{||} De morib. German. & And that of the Visigoths.

who gave the division, were equal in number to the Burgundians who received it. The Roman was injured the least possible: The Burgundians as a martial people, fond of hunting and of a pastoral life, did not refuse to accept of the fallow grounds; while the Romans kept such lands as were properest for culture: the Burgundian's flock fattened the Roman's field.

CHAP. X.

Of servitudes.

THE law of the Burgundians * takes notice, that when those people settled in Gaul, they were allowed two thirds of the land, and one third of the bondmen. The state of villanage was therefore + established in that part of Gaul before it was invaded by the Burgundians.

The law of the Burgundians in points relating to the two nations makes a formal ‡ distinction in both between the nobles, the free-born, and the bondmen. Servitude was not, therefore, a thing particular to the Romans; nor liberty and nobility par-

ticular to the Barbarians.

This very same law says ||, that if a Burgundian freedman had not given a particular sum to his master, nor received a third share of a Roman, he was always supposed to belong to his master's family. The Roman proprietor was therefore free, since he did not belong to another person's family;

* Tit. 54.

† This is confirmed by the whole title of the code

de agricolis, et censitis, et colonis.

† Si dentem optimati Burgundioni vel Romano nobili excusserit. Tit. 26. § 1.; et si mediocribus personis ingenuis, tam Burgundionibus quam Romanis. Ibid. § 2. | Tit. 57.

he was free, because his third portion was a mark

of liberty.

We need only open the Salic and Ripuarian laws, to be fatisfied that the Romans were no more in a state of servitude among the Franks, than among the other conquerors of Gaul.

The count de Boulainvilliers is mistaken in the capital point of his system: he has not proved that the Franks made a general regulation to reduce the

Romans into a kind of fervitude.

As this author's work is penned without art, and as he speaks with the simplicity, frankness, and candour of that ancient nobility from whom he descends, every one is capable of judging of the fine things he says, and of the errours into which he is fallen. I shall not therefore undertake to criticise him; I shall only observe, that he had more wit than understanding, more understanding than knowledge; though his knowledge was not contemptible, for he was well acquainted with the most valuable part of our history and laws.

The Count de Boulainvilliers, and the Abbé du Bos, have formed two different systems; one of which seems to be a conspiracy against the commons, and the other against the nobility. When the Sun gave leave to Phaeton to drive his chariot, he said to him, " If you ascend too high, you will burn "the heavenly mansions a if you descend too low."

- " the heavenly mansions; if you descend too low, you will reduce the earth to ashes: Do not drive
- to the right, you will meet there with the conftellation of the serpent; avoid going too much
- " to the left, you will there fall in with that of the

" altar : keep in the middle #."

CHAP.

Nec preme, nec fummum molire per æthera currum;

Altius egressus, colestia testa cremabis;

Inferius,

CHAP. XI.

The same subject continued.

What first gave rise to the notion of a general regulation made at the time of the conquest, is our meeting with a prodigious number of servitudes in France towards the beginning of the third race; and as the continual progression of these servitudes was not attended to, people imagined in an age of obscurity a general law which was never made.

Towards the commencement of the first race, we meet with an infinite number of freemen, both among the Franks and the Romans; but the number of bondmen increased to that degree, that, at the beginning of the third race, all the husbandmen and almost all the inhabitants § of towns were become bondmen: and whereas at the first period there was very near the same administration in the cities as among the Romans, namely, bodies of citizens, a senate, and courts of judicature; at the other we hardly meet with any thing but a lord and his bondmen.

When the Franks, Burgundians, and Goths made their feveral invasions, they took gold, filver, moveables, clothes, men, women, boys, and whatever the army could carry; the whole was brought to one place, and divided amongst the army *. Hi-

Inferius, terras : medio tutissimus ibis.

Non te dexterior tortum declinat in anguem,

Neve sinisterior pressam rota ducat ad aram.

Inter utramque tene. Ovid Metam. lib. 2.

§ While Gaul was under the domination of the Romans, they formed particular bodies; these were generally freedmen, or the descendents of freedmen.

* See Gregory of Tours, book 2. chap. 27. Ai-

moin, book 1. chap. 12.

story shews, that after the first settlement, that is, after the first devastations, they entered into an agreement with the inhabitants, and left them all their political and civil rights. This was the law of nations in those days; they plundered every thing in time of war, and granted every thing in time peace. Were it not so, how should we find both in the Salic and Burgundian laws such a number of regulations absolutely contrary to a ge-

neral fervitude of the people?

But that which was not effected by the conquest, was effected by the same law of nations + which subfifted after the conquest. Opposition, revolts, and the taking of towns were followed with the fervitude of the inhabitants. And, not to mention the wars which the different conquering nations made against one another, as there was this particularity among the Franks, that the different divisions of the monarchy gave rife continually to civil wars between brothers or nephews, in which this law of nations was constantly practifed, servitudes of course became more general in France than in other countries: and this is, I believe, one of the causes of the difference between our French laws and those of Italy and Spain, in respect to the right of lordships.

The conquest was soon over; and the law of nations then in force was productive of some servitudes. The custom of the same law of nations, which obtained for many ages, gave a prodigious

extent to those servitudes.

Theodoric finagining that the people of Auvergne were not faithful to him, thus addressed the Franks of his division: Follow me, and I will carry you into a country where you shall have gold, silver, captives, clothes, and flocks in abundance; and you shall remove all the people into your own country.

+ See the lives of the faints in the next page.

Gregory of Tours, book 3.

After the peace §, which was concluded between Gontram and Chilpéric, the troops employed in the fiege of Bourges having had orders to return, carried such a large booty away with them, that they hardly left either men or cattle in the

country.

I might quote here ‡ authorities without number: and as the bowels of human compassion were moved at those miseries, as several holy prelates, beholding the captives bound two and two, employed the treasure belonging to the church, and fold even the facred utenfils, to ranfom as many as they could; and as feveral holy monks exerted themfelves on that occasion, it is in the | lives of the faints that we meet with the best eclaircissements on this fubject. And, notwithstanding what may be objected to the authors of those lives, namely, their having been fometimes a little too credulous in refpect to things which God has certainly performed, if they were necessary for the execution of his defigns; yet we draw confiderable lights from thence, in respect to the manners and usages of those times.

When we cast an eye upon the monuments of our history and laws, the whole seems to be a vast so boundless ocean: all those frigid, dry, insipid, and crude writings must be devoured in the same manner, as Saturn is fabled to have devoured the stones.

§ Ibid. book 6. chap. 31.

‡ See the chronicle of Fredegarius, in the year 600, and his continuator, in the year 741; the annals of Fuld, in the year 739, and the lives of the faints in the

next quotation.

See the lives of St. Epiphanius, St. Eptadius, St. Cæsarius, St. Fidolus, St. Porcian, St. Treverius, St. Eusychius, and of St. Leger, the miracles of St. Julian, &c.

Deerant quoque littora ponto. Ovid, lib. 1.
A vast

A vast quantity of land which had been in the hands of freemen *, was changed into mortmain, when the country was stripped of its free inhabitants; those who had a great multitude of bondmen, either took large territories by force, or had them yielded by agreement, and built villages, as may be seen in different charters. On the other hand, the freemen, who cultivated the arts, found themselves reduced to exercise those arts in a state of servitude: thus the servitudes restored to the arts, and to agriculture, whatever they had lost.

It was a customary thing with the proprietors of lands, to give them to the churches, in order to hold them themselves by a quit-rent, thinking to partake by their servitude of the fanctity of the churches.

CHAP. XII.

That the lands belonging to the division of the barbarians paid no taxes.

A People remarkable for their simplicity, and poverty, a free and martial people, who lived without any other industry than that of tending their flocks, and who had nothing but rush cottages to attach them to their † lands; such a people, I say, must have followed their chiefs for the sake of booty, and not to pay or to raise taxes. The art of tax-gathering is always invented too late, and when men begin to enjoy the felicity of other arts.

^{*} Even the husbandmen themselves were not all slaves. See the 18th and 33d law in the code de agricolis, et censitis, et colonis, and the 20th of the same title.

⁺ See Gregory of Tours, book 2.

The transient ‡ tax of a pitcher of wine for every acre, which was one of the exactions of Chilperic and Fredegonda, related only to the Romans. In fact, it was not the Franks that tore the rolls of those taxes, but the clergy, who in those days were all Romans. The burthen of this tax lay chiefly on the inhabitants || of the towns; now these were almost all inhabited by Romans.

Gregory of Tours & relates, that a certain judge was obliged, after the death of Chilperic, to take refuge in a church, for having, under the reign of that prince, ordered taxes to be levied on feveral Franks, who, in the reign of Childebert were ingenui, or freeborn: Multos de Francis, qui tempore Childeberti regis ingenui fuerant, publico tributo subegit. Therefore the Franks, who were not bond-

men, paid no taxes.

There is not a grammarian, but would be ashamed to see how the Abbe du Bos * has interpreted this passage. He observes, that in those days the freemen were called also ingenui. Upon this supposition he renders the Latin word ingenui, by freed from taxes; a phrase, which we indeed may use, as freed from cares, freed from punishments; but in the Latin tongue, such expressions as ingenui a tributis, libertini a tributis, manumissi tributorum, would be quite monstrous.

We find in the law of the Vifigoths +, that when

† Ibid. book 5.

Quæ conditio universis urbibus per Galliam constitutis summopere est adhibita. Lise of St. Aridius.

Book 7.

* Establishment of the French monarchy, tom. 3.

chap. 14. p. 515.

† Judices atque præpositi tertias Romanorum, ab illis qui occupatas tenent, auserant, et Romanis sua exactione sine aliqua dilatione restituant, ut nihil sisco debeat deperire. Lib. 10. tit. 1. cap. 14.

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a barbarian had feized upon the estate of a Roman, the judge obliged him to sell it, to the end that this estate might continue to be tributary; consequent-

ly the barbarians paid no taxes.

The Abbe du Bos ‡, who, to support his system, would fain have the Visigoths subject to taxes ||, quits the literal and spiritual sense of the law, and pretends, upon no other indeed than an imaginary soundation, that between the establishment of the Goths and this law there had been an augmentation of taxes which related only to the Romans. But none but father Hardouin are allowed to exercise thus an arbitrary power over facts.

The fame author makes a wrong use of the capitularies, as well as of the historians and laws of the barbarous nations. When he wants the Franks to pay taxes, he applies to freemen what can be understood only of § bondmen; when he speaks of their military service, he applies to *bondmen what can never relate but to free-

men.

CHAP. XIII.

Of taxes paid by the Romans and Gauls, in the monarchy of the Franks.

I Might here examine whether after the Gauls and Romans were conquered, they continued to pay

‡ Establishment of the Franks in Gaul, tom. 3. cap.

14. p. 510.

He lays a stress upon another law of the Visigoths, book. 10. tit. 1. art. 11. which proves nothing at all; it says only, that he who has received of a lord a piece of land on condition of a rent or service, ought to pay it.

6 Establishment of the French monarchy, tom. 3. chap. 14. p. 513. where he quotes the edict of Pistes,

art. 28. See below, chap. 17.

* Ibid. tom. 3. chap. 4. p. 298.

the taxes to which they were subject under the emperors. But, in order to proceed with greater expedition, I shall be satisfied with observing, that if they paid them in the beginning, they were soon after exempted, and that those taxes were changed into a military service. For I confess I cannot conceive how the Frank's should have been at first such great friends, and afterwards such sudden and vio-

lent enemies, to taxes.

A capitulary * of Lewis le Debonnaire explains extremely well the fituation of the freemen in the monarchy of the Franks. Some troops + of Goths or Iberians, flying from the oppression of the Moors, were received in Lewis's dominions. The agreement made with them was, that, like other freemen, they should follow their count to the army; that upon a march they should mount guard ‡ and patrol under the command also of their count; and that they should furnish horses and carriages for baggage to the king's | commissaries and to the ambassadours in their way to and from court; and that they should not be compelled to pay any farther acknowledgement, but should be treated as the other freemen.

It cannot be faid that these were new usages introduced towards the commencement of the second race. This must be referred at least to the middle, or to the end of the first. A capitulary of the

^{*}In the year 815, chap. 1. which is agreeable to the capitulary of Charles the Bald, in the year 844, art. 1, & 2.

[†] Pro Hispanis in partibus Aquitaniæ, Septimaniæ, & provinciæ confistentibus. Ibid.

[†] Excubias & explorationes quas Waclas dicunt. Ibid.

They were not obliged to furnish any to the count, liid. art. 5.

year † 864 fays, in express terms, that it was the ancient custom for freemen to perform military service, and to furnish likewise the horses and carriages above mentioned; duties particular to themselves, and from which those who possessed the siefs

were exempt, as we shall prove hereafter.

This is not all; there was a regulation * which hardly permitted the imposing of taxes on those freemen. He who had four manors ‡ was always obliged to march against the enemy: he who had but three, was joined with a freeman that had only one; the latter bore the fourth part of the other's charges, and staid at home. In like manner, they joined two freemen who had each two manors; he who went to the army had half his charges bore by him who staid at home.

Again, we have an infinite number of charters in which the privileges of fiefs are granted to lands or districts possessed by freemen, and of which I shall make further mention hereafter. These lands are exempted from all the duties or services, which were required of them by the counts and by the rest of the kings officers: and as all these fervices are particularly enumerated, without making any men-

* Capitulary of Charlemagne, in the year 812, c.

1. Edict of Pistes in the year 864, art. 27.

[†] Ut pagenses Franci, qui caballos habent, cum suis comitibus in hostem pergant. The counts are forbid to deprive them of their horses, ut hostem facere, & debitos paraveredos secundum antiquam conseutudinem exsolvere possint. Edict of Pistes in Balusius, p. 186.

[‡] Quatuor mansos. I fancy that what they called mansus was a particular portion of land belonging to a farm where there were bondmen; witness the capitulary of the year \$53, apud Sylvacum, tit 14. against those who drove the bondmen from their mansus.

tion of taxes, it is manifest that no taxes were im-

posed upon them.

It was very natural that the Roman art of taxgathering should fall of itself in the monarchy of the Franks: it was a most complicate art, far above the conception, and wide from the plan, of those simple people. Were the Tartars to overrun Europe, we should find it very difficult to make them comprehend what is meant by one of our sinanciers.

The * anonymous author of the life of Lewis le Debannaire, speaking of the counts and other officers of the nation of the Franks, whom Charlemagne established in Aquitania, says, that he intrusted them with the care of defending the frontiers, as also with the military power and the intendancy of the demesnes belonging to the crown. This shews the state of the royal revenues under the second race. The prince had kept his demesnes in his own hands, and employed his bondmen in improving them. But the indictions, the capitations, and other imposts raised at the time of the emperors on the persons or goods of freemen, had been changed into an obligation of defending the frontiers, and marching against the enemy.

The bishops writing † to Lewis brother to Charles the Bald, use these words: "Take care "of your lands, that you may not be obliged to "travel continually by the houses of the clergy, and "to tire their bondmen with carriages. Manage "your affairs," continue they, "in such a manner, "that you may have enough to live upon, and to re"ceive embassies." It is evident that the king's revenues ‡ in those days consisted of their demess.

^{*} In Pithou, part 2. p. 157.

⁺ See the capitulary of the year 858, art. 14.

[†] They levied also some duties on rivers, where there happened to be a bridge or passage.

CHAP.

CHAP. XIV.

Of what they called cenfus.

A Fter the barbarians had quitted their country, they were defirous of reducing their usages into writing; but as they found a difficulty in writing German words with Roman letters, they published these laws in Latin.

In the confusion and rapidity of the conquest, most things changed their nature: in order however to express them, they were obliged to make use of such old Latin words, as were most analogous to the new usages. Thus whatever was likely to revive * the idea of the ancient census of the Romans, they called by the name of census, tributum; and when things had no relation at all to the Roman census, they expressed, as well as they could, the German words by Roman letters: thus they formed the word fredum, on which I shall have occasion to descant in the following chapters.

The words census and tributum having been employed in an arbitrary manner, this has thrown some obscurity on the signification in which these words were used under our princes of the first and second race. And modern + authors who had adopted particular systems, having sound these words in the writings of those days, imagined that what

† The Abbe du Bos, and his followers.

^{*} The census was so generical a word, that they made use of it to express the tolls of rivers, when there was a bridge or ferry to pass. See the third capitulary, in the year 803, edition of Balusius, p. 305. art. 1. and the 5th in the year 819, p. 616. They gave likewise this name to the carriages furnished by the freemen to the king, or to his commissaries, as appears by the capitulary of Charles the Bald, in the year 865, art. 8.

was then called census, was exactly the census of the Romans; and from thence they inferred this consequence, that our kings of the two first races had put themselves in the place of the Roman emperors, and made no change in ‡ their administration. Besides, as particular duties raised under the second race were by chance and by certain || restrictions converted into others, they inferred from thence that these duties were the census of the Romans: and, as since the modern regulations, they found that the crown-demesses were absolutely unlienable, they pretended that those duties which represented the Roman census, and did not form a part of the demesses, were mere usurpations. I omit the other consequences.

To apply the ideas of the present time to distant ages, is a most fruitful source of errour. To those people who want to modernize all the ancient ages, I shall say what the Egyptian priests said to Solon,

" O Athenians, you are mere children!"

CHAP. XV.

That what they called census was raised only on the bondmen, and not on the freemen.

THE king, the clergy, and the lords raised regular taxes, each on the bondmen of their respective demesses. I prove it with respect to the king, by the capitulary de villis; with regard to the

‡ See the weakness of the arguments produced by the Abbe du Bos, in the establishment of the French monarchy, tom. 3. book 6. chap. 14. especially in the inference he draws from a passage of Gregory of Tours, concerning a dispute between his church and King Charibert.

I For instance, by infranchisements.

clergy, by the codes of the § laws of the barbarians; and with relation to the lords, by the regulations * which Charlemagne made concerning this subject.

These taxes were called census; they were œconomical and not fiscal duties, mere private services, and

not public obligations.

I affirm, that what they called census at that time, was a tax raised upon the bondmen. This I prove by a formulary of Marculfus containing a permission from the king to enter into holy orders, provided the person be † freeborn, and not involled in the register of the census. I prove it also by a commission from Charlemagne to a count ‡, whom he had sent into Saxony; which contains the infranchisement of the Saxons for having embraced Christianity, and is properly a charter of freedom . This prince restores them to their former § civil liberty, and exempts them from paying the census. It was therefore the same thing to be a bondman, as to pay the census; to be free as not pay it.

By a kind of letters patent + of the same prince in favour of the Spaniards, who had been received

§ Law of the Allemans, chap. 22. and the law of the Bavarians, tit. 1. chap. 14. where the regulations are to be found which the clergy made concerning their order.

* Book 5. of the capitularies, chap. 303.

+ Si ille de capite suo bene ingenuus sit, et in Puletico publico censitus non est. Lib. 1. formul. 19.

In the year 789, edition of the capitularies by Balusius, vol. 1. p. 250.

Et ut ista ingenuitatis pagina sirma stabilisque consistat. Lib. 1. formul. 19.

§ Pristinæque libertati donatos, & omni nobis debito

cenfu folutos. Ibid.

4 Praceptum pro Hispanis, in the year 812, edition of Balusius, tom. 1. p. 500.

into the monarchy, the counts are forbid to demand any census of them, or to deprive them of their lands. That strangers upon their coming to France were treated as bondmen, is a thing well known; and Charlemagne being desirous they should be considered as freemen, since he would have them be proprietors of their lands, forbade the demanding any census of them.

A capitulary of Charles the Bald +, given in favour of those very Spaniards, orders them to be treated like the other Franks, and forbids the requiring any census of them; consequently this census

was not paid by freemen.

The thirtieth article of the edict of Pistes reforms the abuse, by which several of the husbandmen belonging to the king or to the church, sold the lands dependent on their manors to ecclesiastics, or to people of their condition, reserving only a small cottage to themselves; by which means they avoided paying the census; and it ordains, that things should be restored to their primitive situation: the census was therefore a tax peculiar to bondmen.

From thence also it follows, that there was no general census in the monarchy; and this is clear from a great number of passages. For what could be the meaning of this ‡ capitulary, We ordain that the royal census shall be levied in all places, where formerly it was | lawfully levied? What could be the meaning of that in which Charlemagne § orders

† In the year 844, edition of Balusius, tom. 2. art.

1, and 2. p. 17.

† Third capitulary of the year 805, art. 20. & 23. inferted in the collection of Ansegise, book 3. art. 15. This is agreeable to that of Charles the Bald, in the year 854, apud Attiniacum, art. 6.

Undecunque legitime exigebatur. Ibid.

§ In the year 812, art. 10. & 11. edition of Baluflus, tom. 1. p. 498.

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his commissaries in the provinces to make an exact inquiry into all the census's that belonged in former times * to the king's demesne? And of that † in which he disposes of the census's paid by those ‡ of whom they are demanded? What can that other capitulary || mean, in which we read, If any person § has acquired a tributary land, on which we were accustomed to levy the census? and that other, in fine ‡, in which Charles the Bald ++ makes mention of the censual lands, whose census had from time immemorial belonged to the king.

Observe that there are some passages which seem at first sight to be contrary to what I have said, and yet they confirm it. We have already seen that the freemen in the monarchy were obliged only to furnish particular carriages: the capitulary just now cited gives to this + the name of census, and opposes it to the census paid by the bondmen.

Besides, the edict ** of Pistes takes notice of those freemen who were obliged to pay the royal census for their so head, for their cottages, and who had

* Undecunque antiquitus ad partem regis venire solebant. Capitulary of the year 812. art. 10, 11.

† In 813, art. 6. edition of B lusius, tom. 1. p. 508. ‡ De illis unde censa exigunt. Capitulary of the year 813. art. 6.

Book 4. of the capitularies, art. 37. and inferted

in the law of the Lombards.

§ Si quis terram tributariam, unde census ad partem nostram exire solebat, susceperit. Book 4. of the capitularies, art. 37.

4 In the year 805, art. 8.

++ Unde census ad partem regis exivit antiquitus. Capitulary of the year 805. art. 8.

+ Cenfibus vel paraveredis quos franci homines ad

regiam potestatem exfolvere debent.

** In the year 864, art. 34. edition of Balusius, p. 192.

De illis francis hominibus qui censum regium de suo capite & de suis recellis debeant. Ibid.

fold themselves during the famine. The king orders them to be ranfomed. This is * because those who were manumitted by the king's letters, did not, generally speaking, acquire a full and perfect liberty, + but they paid censum in capite; and these are the people here meant.

We must therefore explode the idea of a general and universal census, derived from the Roman policy, from which cenfus the rights of the lords are also supposed to have been derived by usurpations. What was called census in the French monarchy, independently of the abuse made of that word, was a particular tax imposed on the bondmen by their masters.

I beg the reader to excuse the trouble I must give him with fuch a number of citations. I should be more concise, did I not meet with the Abbé du Bos's book on the establishment of the French monarchy in Gaul, continually in my way. Nothing is a greater obstacle to our progress in knowledge, than a bad performance of a celebrated author; because, before we instruct, we must begin with undeceiving.

CHAP. XVI.

Of the feudal lords or vaffals.

I Have taken notice of those volunteers among the Germans, who followed their princes in their feveral expeditions. The fame usage conti-

* The 28th article of the fame edict explains this extremely well; it even makes a distinction between a Roman freedman and a Frank freedman: And we likewise see there that the census was not general; it deferves to be read.

† As appears by a capitulary of Charlemagne in the

year 813, which we have already quoted.

nued after the conquest. Tacitus mentions them by the name of Companions *; the Salic law by that of men who have vowed fealty † to the king; the formularies of ‡ Marculfus by that of the king's antrustio's ||, the earliest French historians by that of leudes §, faithful and loyal; and those of later

date by that of vaffals + and lords.

In the Salic and Ripuarian laws we meet with an infinite number of regulations in regard to the Franks, and only with a few for the Antrustio's. The regulations concerning the Antrustio's are different from those which were made for the other Franks; they are full of what relates to the settling of the property of the Franks, but mention not a word concerning that of the antrustio's. This is because the property of the latter was regulated rather by the political than by the civil law, and was the share that fell to an army, and not the patrimony of a family.

The goods referved for the feudal lords were called fifcal + goods, benefices, honours, and fiefs,

by different authors, and in different times.

There is no doubt but the fiefs at first were at will + . We find in Gregory of Tours =, that Su-

* Comites.

+ Qui funt in truste regis. Tit. 44. art 4.

Book i. formul. 18.

From the word trew, which fignifies faithful a-mong the Germans.

Leudes, fideles. 4 Vaffalli, feniores.

+ Fiscalia. See the 14th formulary of Marculfus, book i. It is mentioned in the life of St. Maur, dedit fiscum unum: And in the annals of Metz, in the year 747, dedit illi comitatus et fiscos plurimos. The goods designed for the support of the royal family, were called regalia.

++ See the 1st book, tit. i. of the fiefs; and Cujas

on that book.

= Book ix. chap. 38.

negifilus and Gallomanus were deprived of all they held of the exchequer, and no more left than what was their real property. When Gontram raised his nephew Childebert to the throne, he had a private conference with him, in which he named *the persons who ought to be honoured with, and those who ought to be deprived of the fiefs. In a formulary + of Marculfus, the king gives in exchange not only the benefices held by his exchequer, but likewise those which had been held by another. The law of the Lombards opposes ‡ the benefices to property. In this our historians, the formularies, the codes of the different barbarous nations, and all the monuments extant of those days, are unanimous, In fine, the writers of the book of fiefs | inform us, that at first the lords could take them back when they pleafed, that afterwards they granted them for the space of a year §, and that at length they gave them for life.

CHAP. XVII.

Of the military service of freemen.

TWO forts of people were bound to military fervice; the great and leffer vaffals, who were

* Quos honoraret muneribus, quos ab honore de-

pelleret. Ibid. lib. 7.

† Vel reliquis quibuscumque beneficiis, quodeumque ille, vel fiscus noster, in ipsis locis tenuisse noscitur. Lib. 1. formul. 30.

‡ Lib. iii. tit. 8. § 3.

Antiquissimo enim tempore sic erat in dominorum potestate connexum, ut quando vellent possent auserre rem in seudum a se datam: Postea vero conventum est, ut per annum tantum sirmitatem haberent; deinde statutum est, ut usque ad vitam sidelis produceretur. Feudorum, lib. i. tit. 1.

It was a kind of a precarious tenure, which the lord confented or refused to renew every year; as Cu-

jas has observed.

obliged in consequence of their fief; and the freemen, whether Franks, Romans, or Gauls, who ferved under the count, and were commanded by him and his officers.

The name of freemen was given to those, who on the one hand had no benefices or fiefs, and on the other were not subject to the base services of villainage; the lands they possessed were what they called allodial estates.

The counts * affembled the freemen, and led them against the enemy; they had officers under them, who were called † vicars; and as all the freemen were divided into hundreds, which formed what was called a borough, the counts had also officers under them, who were called centenarii, and carried the freemen ‡ of the borough, or their hundreds, to the field.

This division into hundreds is posterior to the establishment of the Franks in Gaul. It was made by Clotarius and Childebert, with a view of obliging each district to answer for the robberies committed in their division; this we find in the decrees of those princes. A regulation of this kind is to this very day observed in England.

As the counts carried the freemen against the enemy, the feudal lords carried also their vassals or

* See the capitulary of Charlemagne in the year 812, art. 3, & 4. edition of Balusius, tome 1. page 491. and the edict of Pistes in the year 864, art. 26. tome 2. page 186.

+ Et habeat unusquisque comes vicarios et contena-

rios fecum. Book ii. of the capitularies, art. 28.

t They were called compagenses.

Published in the year 595, art. 1. See the capitularies, edition of Balusius, page 20. These regulations were undoubtedly made by agreement.

rear-

rear-vassals; and the bishops, abbots, or their *

advocates carried likewife theirs +.

The bishops were greatly embarrassed, and ‡ inconsistent with themselves; they requested of Charlemagne not to oblige them any longer to a military service; and when he had granted their request, they complained that he had deprived them of the public esteem; so that this prince was obliged to justify his intentions upon this head. Be that as it may, when they were exempted from marching against the enemy, I do not find that their vassals were led by the counts; on the contrary we see that the kings or the bishops chose one of their feudataries to conduct them.

In a capitulary § of Lewis le Debonnaire, this prince distinguishes three sorts of vassals, those belonging to the king, those to the bishops, and those to the counts. The vassals + of a feudal lord were not led against the enemy by the count, except some employment in the king's household hindered the

lord himself from leading them.

* Advocati.

† Capitulary of Charlemagne in the year 812, art. 1, & 5. edition of Balusius, tome 1. page 490.

‡ See the capitulary of the year 803, published at

Worms, edition of Balufius, page 408, & 410.

| Capitulary of Worms, in the year 803, edition of Balusius, page 409. and the council in the year 845, under Charles the Bald, in Verna palatio, edition of Balusius, tome ii. page 17. art. 8.

The 5th capitulary of the year 819. art. 27. edi-

tion of Balufius, page 618.

De vassis dominicis, qui adhuc intra casam serviunt, & tamen beneficia habere noscuntur, statutum est, ut quicunque ex eis cum domino imperatore domi remanserint, vassallos suos casatos secum non retineant; sed cum comite, cujus pagenses sunt, ire permittant. Capitulary 2. in the year 812, art. 7. edition of Balusius, tome 1. page 494.

But

But who is it that led the feudal lords into the field? No doubt the king himfelf, who was always at the head of his faithful vaffals. Hence we conflantly find in the capitularies a distinction made * between the king's vaffals and those of the bishops. Such brave and magnanimous princes as our kings, did not take the field to put themselves at the head of an ecclesiastic militia; these were not the men

they chose to conquer or die with.

But these lords carried their vassals and rearvaffals with them; as we can prove by the capitulary +, in which Charlemagne ordains that every freeman, who has four manors either in his own property, or as a benefice from fomebody elfe. should march against the enemy or follow his lord. It is evident, that Charlemagne means, that the person who had a manor of his own should march under the count, and he who held a benefice of a lord should fet out along with him.

And yet the abbé du Bos 1 pretends, that, when mention is made in the capitularies of tenants who depended on a particular lord, no others are meant than bondmen; and he grounds his opinion on the law of the Vifigoths, and the practice of that na-It is much better to rely on the capitularies themselves; that which I have just quoted, says expressly the contrary. The treaty between Charles

* Capitulary 1. of the year 812. art. 5. de hominibus nostris, & Episcoporum & Abbatum, qui vel beneficia vel talia propria habent, &c. Edition of Balusius,

tome i. page 490.

† In the year 812, chap. 1. edition of Balufius, page 490. Ut omnis homo liber, qui quatuor mansos vestitos de proprio suo, sive de alicujus benefició habet, ipse se præparet, et ipse in hostem pergat, sive cum seniore luo.

† Tome iii. book 6. chap. 4. page 299. establish-

ment of the French monarchy.

the Bald and his brothers, takes notice also of freemen, who might chuse to follow either a lord or the king; and this regulation is conformable to a

great many others.

We may therefore conclude, that there were three forts of military fervices; that of the king's vaffals, who had other vaffals under them; that of the bishops or of the other clergy, and their vaffals; and, in fine, that of the count who commanded the freemen.

Not but the vaffals might be also subject to the count; as those who have a particular command are subordinate to him who is invested with a more

general authority.

We even find that the count and the king's commissaries might oblige them to pay the fine, when they had not fulfilled the engagements of their fief.

In like manner, if the king's vassals * committed any outrage, they were subject to the correction of the count, unless they chose to submit rather to that of the king.

CHAP. XVIII.

Of the double service.

IT was a fundamental principle of the monarchy, that who foever was subject to the military power of another person, was subject also to his civil jurisdiction. Thus the capitulary + of Lewis le Debonnaire in the year 815, makes the military power of the count, and his civil jurisdiction over the

* Capitulary of the year 882, art, 11. apud Vernis palatium, edition of Balusus, tome 2. page 289.

[†] Art. 1, 2, and the council in Verno palatio of the year 845. art. 8. edition of Balusius, tome 2. page 17.

freemen, keep always an equal pace. Thus the placita * of the count who carried the freemen against the enemy, were + called the placita of the freemen; from whence undoubtedly came this maxim, that the questions relating to liberty could be decided only in the count's placita, and not in those of his officers. Thus the count never led the vaffals ‡ belonging to the bishops or to the abbots against the enemy, because they were not subject to the civil jurisdiction. Thus he never commanded the rear-vaffals belonging to the king's vaffals, Thus the gloffary || of the English laws informs us, that those to whom § the Saxons gave the name of coples, were by the Normans called counts, or companions, because they shared the judiciary fines with the king. Thus we fee, that at all times the duty of a vaffal 4 towards his lord, was to bear arms +. and to try his peers in his court.

One of the reasons which produced this connection between the judiciary right and that of leading the forces against the enemy, was, because the person who led them exacted at the same time the payment of the siscal duties, which consisted in same carriage-services due by the freemen, and in

* Or affizes.

† Capitularies, book iv. of the collection of Ansegise, art. 57. and the 5th capitulary of Lewis le Debonnaire in the year 819. art. 14. edition of Balusius, tome 1. page 615.

‡ See the 8th note of the preceding chapter.

It is to be found in the collection of William Lambard, de priscis Anglorum legibus.

In the word Satrapia.

4 This is well explained by the affizes of Jerusalem,

chap. 221, & 222.

+ The advowees of the church (advocati) were equally at the head of their placita, and of their militia.

general in certain judiciary profits, of which we shall treat hereafter.

The lords had the right of administering justice in their sief, by the same principle as the counts had it in their counties. And indeed, the counties, in the several variations that happened at different times, always followed the variations of the siefs; both were governed on the same plan, and by the same principles. In a word, the counts in their counties were lords, the lords in their signories were counts.

Those have been mistaken who considered the counts as civil officers, and the dukes as military commanders. Both were equally civil * and military officers: The whole difference consisted in the duke's having several counts under him, though there were counts who had no duke over them, as we learn from Fredegarius +.

It will be imagined perhaps that the government of the Franks must have been very severe at that time, since the same officers were invested with a military and civil power, nay, even with a fiscal power, over the subjects; which in the preceding books I have observed to be distinguishing marks of despotic authority.

But it is not to be believed that the counts pronounced judgement by themselves, and administered justice in the same manner as the bashaws do in Turky: In order to judge affairs, they assembled a kind of assizes, where the principal men appeared.

In order to understand thoroughly what relates to the judicial proceedings, in the formulas, in

^{*} See the 8th formulary of Marculfus, book i. which contains the letters given to a duke, patrician, or count; and invests them with the civil jurisdiction, and the fiscal administration.

[†] Chronicle, chap. 78. in the year 636.

the laws of the barbarians, and in the capitularies, it is proper to observe, that the functions of the count, of the grasso or fiscal judge, and the centenarius, were the same; that the judges, the rathimburghers, and the sheriffs, were the same persons under different names. These were the count's affistants, and were generally seven in number; and as he was obliged to have twelve persons to judge *, he filled up the number with the principal men +.

But who had the jurisdiction, the king, the count, the grafio, the centenarius, the lords, or the clergy, they never judged alone; and this usage, which derived its origin from the forests of Germany, was still continued even after the siefs

had affumed a new form.

With regard to the fiscal power, its nature was fuch, that the count could hardly abuse it. The rights of the prince in respect to the freemen, were so simple, that they confisted only, as we have already observed, in certain carriages which were the demanded of them on some public occasions. And as for the judiciary rights, there were laws which prevented missements.

* See concerning this subject the capitularies of Lewis le Debonnaire, added to the Salic law, art. 2. and the formula of judgements given by Du Cange in the word boni homines.

† Per bonos homines, sometimes there were none but principal men. See the appendix to the Formularies of Marculfus, chap. 51.

‡ And fome tolls on rivers, of which I have spoke

already.

|| See the law of the Ripuarians, tit. 89. and the law of the Lombards, book ii. tit. 52. § 9.

CHAP. XIX.

Of compositions among the barbarous nations.

SINCE it is impossible to have any tolerable notion of our political law, unless we are thoroughly acquainted with the laws and manners of the German nations, I shall therefore stop here a while, in order to inquire into those manners and laws.

It appears by Tacitus, that the Germans knew only two capital crimes; they hanged traitors, and drowned cowards; these were the only public crimes among those people. When a man * had injured another, the relations of the person injured took share in the quarrel, and the offence was This fatisfaction was cancelled by a fatisfaction. made to the person offended when capable of receiving it; or to the relations, if they had been injured in common, or if by the decease of the party injured, the fatisfaction had devolved to them.

In the manner mentioned by Tacitus, these satisfactions were made by the mutual agreement of the parties; hence in the codes of the barbarous nations these satisfactions are called compositions.

The law + of the Frisians is the only one I find that has left the people in this situation, in which every family at variance was in fome measure in the state of nature, and in which being unrestrained either by a political or civil law, they might give loofe to their revenge, till they had obtained fatisfaction. Even this law was moderated; a

Vulemar's addition on robberies.

^{*} Suscipere tam inimicitias, seu patris seu propinqui, quam amicitias necesse est; nec implacabiles durant; luitur enim etiam homicidium certo armamentorum ac pecorum numero, recipitque satisfactionem universa domus. Tucit. de morib. Germ.

⁺ See this law in the 2d title on murders; and

regulation was made *, that the person whose life was sought after should be unmolested in his own house, as also in going and coming from church, and from the court where causes were tried.

The compilers of the Salic laws cite † an ancient usage of the Franks, by which a person who had dug a corpse out of the ground in order to strip it, should be banished from society, till the relations had consented to his being readmitted. And as before that time a prohibition was made to every one, even to his own wise, not to give him a morsel of bread, or to receive him under their roof; such a man was in respect to others, and others in respect to him, in a state of nature, till an end was

put to this state by a composition.

This excepted, we find that the fages of the different barbarous nations thought of determining by themselves, what would have been too long and too dangerous to expect from the mutual agreement of the parties. They took care to fix the value of the composition which the party injured was to receive. All those barbarian laws are in this respect most admirably exact; the several cases are minutely ‡ distinguished, the circumstances are weighed, the law substitutes itself in the place of the person injured, and insists upon the same satisfaction as he himself would have demanded in cold blood.

By the establishing of those laws, the German nations quitted that state of nature, in which they seem to have lived in Tacitus's time.

Rotharis declares in the law of | the Lombard's

* Additio fapientum, tit. 1. § 1.

† Salic law, tit. 58. § 1. tit. 17. ‡ The Salic laws are admirable in this respect; see especially the titles 2, 3, 4, 5, 6, and 7, which related

book i. tit. 7. § 15.

that he had increased the compositions anciently accustomed for wounds, to the end that the wounded person being fully satisfied, all enmities should cease. In fact, as the Lombards, from a very poor people, were grown rich by the conquest of Italy, the ancient compositions were become frivolous, and reconcilements were prevent. I do not question but this was the motive which obliged the other chiefs of the conquering nations to make the different codes of laws now extant.

The principal composition was that which the murderer paid to the relations of the deceased. The difference of * stations produced a difference in the compositions: I hus in the law of the Angli, there was a composition of six hundred sous for the murder of an adeling, two hundred for that of a freeman, and thirty for killing a bondman. The greatness therefore of the composition fixed on the life of a man, was one of his principal prerogatives; for, beside the distinction it made of his person, it likewise established a greater security in his favour among rude and violent nations.

This we are made fensible of by the law of the † Bavarians: It gives the names of the Bavarian families who received a double composition, because they were the first ‡ after the Agilolsings. The Agilolsings were of the ducal race, and it was customary with that nation to chuse a duke out of that family; these had a quadruple composition. The composition for the duke exceeded by a third, that which had been established for the Agilolsings:

^{*} See the law of the Angli, tit. 1. § 1, 2, & 4, ibid. tit. 5, § 6. the law of the Bavarians, tit. 1. chap. 8, & 9, and the law of the Frifians, tit. 15.

[†] Tit. 2. chap. 20.

[‡] Hozidra, Ozza, Sagana, Habilingua, Aniena.

Because he is a duke, says the law, a greater honour

is paid to him than to his relations.

All these compositions were valued in money. But as those people, especially when they lived in Germany, had very little specie, they might pay it in cattle, corn, moveables, arms, dogs, hawks *, lands, &c. Very often the law itself † determined the value of those things; which explains how it was possible for them to have such a number of pecuniary punishments with so very little money.

These laws were therefore employed in determining exactly the difference of wrongs, injuries, and crimes; to the end, that every one might know precisely how far he had been injured or offended, the reparation he was to receive, and especially

that he was to receive no more.

In this light it is easy to conceive, that a person who had taken revenge after having received satisfaction, was guilty of a very great crime. This crime contained a public as well as a private offence: It was a contempt of the very law itself: A crime which the legislators ‡ never sailed to punish.

There was another crime, which above all others

* Thus the law of Ina valued life by a certain sum of money, or by a certain portion of land. Legis Ina regis, titulo de villico regio, de priscis Anglorum legibus.

Cambridge 1644.

† See the law of the Saxons, which makes this fame regulation for several people, chap. 18. See also the law of the Ripuarians, tit. 36. § 11. the law of the Bavarians, tit. 1. § 10, 11. Si aurum non habet, donet aliam pecuniam, mancipia, terram, &c.

‡ See the law of the Lombards, book i. tit. 25 § 21. ibid. book i. tit. 9. § 8, & 34. ibid. § 38. and the capitulary of Charlemagne in the year 802. chap. 32. containing an instruction given to those whom he sent

into the provinces.

was confidered as dangerous *, when those people lost something of their spirit of independence, and when the kings endeavoured to establish a better civil administration: This was the refusing to give or to receive satisfaction. We find in the different codes of the laws of the Barbarians, that the legislators obliged † them to it. In sact, a person who refused to receive satisfaction, wanted to preserve his right of revenge; he who refused to give it, left the right of taking revenge to the person injured; and this is what the sages had reformed in the institutions of the Germans, whereby people were invited, but not compelled to compositions.

I have just now made mention of a text of the Salic law, in which the legislator left the party offended at liberty to receive or to refuse satisfaction; it is this law ‡ by which a person who had stripped a dead body was expelled from society, till the relations, upon receiving satisfaction, petitioned for his being readmitted. It was owing to the respect they had for sacred things, that the compilers of

* See in Gregory of Tours, book vii. chap. 47. the detail of a process wherein a party loses half the composition that had been adjudged to him, for having done justice to himself, instead of receiving satisfaction, whatever injury he might have afterwards received.

† See the law of the Saxons, chap. 3, & 4. the law of the Lombards, book i. tit. 37. § 1, & 2. and the law of the Allemans, tit. 45. § 1, & 2. This last law gave leave to the party injured to right himself upon the spot, and in the first transport of passion. See also the capitularies of Charlemagne in the year 779, thap. 22. in the year 802, chap. 32. and also that of the year 805, chap. 5.

† The compilers of the laws of the Ripuarians feem to have foftened this. See the 85th title of those

laws.

the Salic laws did not meddle with the ancient u-

fage.

It would have been absolutely unjust to grant a composition to the relations of a robber killed in the fact, or to the relations of a woman who had been repudiated for the crime of adultery. The law * of the Bavarians allowed no composition in the like cases, but punished the relations who sought for revenge.

It is no rare thing to meet with compositions for involuntary actions in the codes of the laws of the barbarians. The law of the Lombards is generally very prudent; it † ordained, that in those cases the compositions should be according to the perfon's generosity; and that the relations should no longer be permitted to pursue their revenge.

Clotarius the Second made a very wife decree: He forbade ‡ the person robbed to receive any clandestine composition, and without an order from the judge. We shall see presently the motive of

this law.

CHAP. XX.

Of what was afterwards called the jurisdiction of the lords.

BESIDE the composition which they were obliged to pay to the relations for murders, or injuries, they were also under a necessity of paying a certain duty, which the codes of the barbarous laws call

† Book i. tit. 9. § 4. † Pactus pro tenore pacis inter Childebertum & Clotarium, anno 593, & decreto Clotarii II. regis cir-

ca annum 595. cap. 11.

^{*} See the decree of Tassillon, de popularibus legibus, art. 3, 4, 10, 16, 19. the law of the Angli, tit. 7.

fredum *. We have no term in our modern languages to express it; yet I intend to treat of it at large; and in order to give an idea of it, I begin with defining it a recompence for the protection

granted against the right of revenge.

The administration of justice among those rude and unpossished nations, was nothing more than granting to the person who had committed an offence, a protection against the revenge of the party offended, and obliging the latter to accept of the satisfaction due to him: Insomuch, that among the Germans, contrary to the practice of all other nations, justice was administered in order to pro-

tect the criminal against the party injured.

The codes of the barbarian laws have given us the cases in which these freda might be demanded. When the relations could not profecute, they allow of no fredum; in fact, when there was no profecution, there could be no composition for a protection against it. Thus, in the law of the + Lombards, if a person happened to kill a freeman by chance, he paid the value of the man killed, without the fredum; because, as he had killed him involuntarily, it was not the case in which the relations were allowed the right of revenge. Thus in the law of the Ripuarians t, when a man was killed with a piece of wood, or with any inftrument made by man, the instrument or the piece of wood was deemed culpable, and the relations feized upon them for their own use, but were not allowed to demand the fredum.

+ Book i. tit. 9. § 17. edition of Lindembroek.

‡ Tit. 70.

^{*} When it was not determined by law, it was generally the third of what was given for the composition, as appears in the law of the Ripuarians, chap. 89. which is explained by the third capitulary of the year 813, edition of Balusius, tome 1. page 512.

In like manner, when a beast happened to kill a man, the * same law established a composition without the fredum, because the relations of the deceased were not offended.

In fine, it was ordained by the † Salic law, that a child who had committed a fault before the age of twelve, should pay the composition without the fredum: As he was not yet able to bear arms, he could not be in the case in which the party injured, or his relations, had a right to demand satisfaction.

It was the criminal that paid the *fredum* for the peace and fecurity of which he had been deprived by his crime, and which he might recover by protection. But a child did not lose this fecurity; he was not a man, and consequently could not be ex-

pelled from human fociety.

This fredum was a local right in favour of the person who was ‡ judge of the district. Yet the law of the # Ripuarians forbade him to demand it himself; it ordained, that the party who had gained the cause should receive it, and carry it to the exchequer, to the end that there might be an eternal peace, says the law, among the Ripuarians.

The greatness of the fredum was proportioned to the greatness of the § protection: Thus the fredum

for

+ Tit. 28. 66.

| Tit. 89.

^{*} Tit. 46. See also the law of the Lombards, book i. chap. 21. § 3. Lindembroek's edition: Si caballus cum pede, &c.

[‡] As appears by the decree of Clotarius II. in the year 595.; fredus tamen judici in cujus pago est reservetur.

[§] Capitulare incerti anni, chap. 57. in Balusius, tome 1. page 515. and it is to be observed, that what was called fredum or faida, in the monuments of the first

for the king's protection was greater than what was granted for the protection of the count, or of the

other judges.

Here I fee the origin of the jurisdiction of the The fiefs comprized very large territories, as appears from a vast number of records. I have already proved that the kings raised no taxes on the lands belonging to the division of the Franks; much less could they referve to themselves any duties on Those who obtained them, had in this the fiefs. respect a full and perfect enjoyment, reaping every fruit and possible emolument from them. one of the most considerable * emoluments was the judiciary profits (freda), which were received according to the usage of the Franks, it followed from thence, that the person seised of the sief, was also seised of the jurisdiction, the exercise of which confifted of the compositions made to the relations, and of the profits accruing to the lord; it was nothing more than ordering the payment of the compositions of the law, and demanding the lawfines.

We find by the formularies containing a confirmation of the perpetuity of a fief, in favour of a feudal lord +, or of the privileges of fiefs in favour of ‡ churches, that the fiefs were possessed of this right. This appears also from an infinite number

first race, is called by the name of bannum in those of the second race; as appears from the capitulary de

partibus Saxoniæ, in the year 789.

* See the capitulary of Charlemagne, de villis, where he ranks these freda among the number of the great revenues of what was called villa, or the king's demesnes.

† See the 3d, 4th, and 17th formula, book i. of Marculfus.

‡ See the 2d, 3d, and 4th formula of Marculfus, book i.

of charters * containing a prohibition of the king's judges or officers of entering upon the territory in order to exercise any act of judicature whatsoever, or to demand any judiciary emolument. When the king's judges could no longer demand any thing in a district, they never entered it; and those to whom this district was lest, exercised the same functions as had been exercised before by the judges.

The king's judges are forbidden also to oblige the parties to give security for their appearing before them. It belonged therefore to the person who had received the territory in sief, to demand this security. They mention also, that the king's commissaries shall no longer insist upon being accommodated with a lodging; in effect, they no longer

exercifed any function in those districts.

The administration therefore of justice, both in the old and new fiefs, was a right inherent in the very fief itself, a lucrative right which constituted a part of it. For this reason it has been considered at all times in this light; from whence this maxim arose, that jurisdictions are partimonial in France.

Some have thought that the jurisdictions derived their origin from the manumissions made by the kings and lords, in favour of their bondmen. But the German nations, and those descended from them, are not the only people who manumised their bondmen, and yet they are the only people that established patrimonial jurisdictions. Besides, we find by the formularies † of Marculfus, that there

* See the collections of those charters, especially that at the end of the 5th volume of the historians of France, published by the Benedictine monks.

+ See the 3d, 4th, and 14th of the first book, and the charter of Charlemagne, in the year 771, in Margenne, tome 1. anecdot. collect. 11. Præcipientes jubemus,

there were freemen dependent on the jurisdictions in the earliest times: The bondmen were therefore fubject to the jurisdiction, because they were upon the territory; and they did not give rife to the

fiefs for having been comprised in the fief.

Others have taken a shorter cut: The lords, fay they, and this is all they fay, usurped the jurisdictions. But are the nations descended from Germany, the only people in the world that usurped the rights of princes? We are fufficiently informed by history, that feveral other nations have encroached upon their fovereigns, and yet we find no other instance of what we call the jurisdiction of the lords. The origin of it is therefore to be traced in the u-

fages and customs of the Germans.

Whoever has the curiofity to look into Loyfeau *, will be furprifed at the manner in which this author supposes the lords to have proceeded, in order to form and usurp their different jurisdictions. They must have been the most cunning people in the world; they must have robbed and plundered, not after the the manner of a military people, but as the judges of a village and the attornies rob one another. Those brave warriours must be be said to have formed throughout all the particular provinces of the kingdom, and in fo many kingdoms, a general system of politics: Loyseau makes them reason as he himself reasoned in his closet.

Once more: If the jurisdiction was not a dependence of the fief, how come we every where + to find, that the service of the fief was to attend the

bemus, ut ullus judex publicus homines ipsius ecclesiæ et monasterii ipsius Morbacensis, tam ingenuos quam et servos. & qui super eorum terras manere, &c.

^{*} Treatife of village-jurisdictions.

[†] See Monf. du Cange on the word hominium.

king or the lord, both in their courts and in the army?

CHAP. XXI.

Of the territorial jurisdiction of the churches.

THE churches acquired a very confiderable property. We find that our kings gave them great feigniories, that is, great fiefs; and we find jurisdictions established at the same time in the demesnes of those churches. From whence could so extraordinary a privilege derive its origin? It must certainly have been in the nature of the thing given; the church-land had this privilege, because it had not been taken from it. A seigniory was given to the church; and it was allowed to enjoy the same privileges, as if it had not been given to a vassal. It was also subjected to the same service as it would have paid to the state, if it had been granted to a layman, according to what we have already observed.

The churches had therefore the right of demanding the payment of compositions in their territory; and of insisting upon the fredum; and as those rights necessarily implied that of hindering the king's officers from entering upon the territory, to demand these freda, and to exercise acts of judicature, the right which the ecclesiastics had of administering justice in their own territory, was called immunity, in the style of the formularies; of the charters, and of the capitularies.

The law of the Ripuarians * forbids the freedmen

+ See the 3d and 4th formulary of Marculfus, book 1.

* Ne alicubi, nisi ad ecclesiam ubi relaxati sunt, mallum teneant. Tit. 58. § 1. See also § 19. Lindembroek's edition. of † the churches, to hold the affembly ‡ for administering justice in any other place than in the church where they were manumised. The churches had therefore jurisdictions even over freemen, and held their placita in the earliest times of the

monarchy.

I find in the lives of the faints ||, that Clovis gave to a certain holy person a power over a district of fix leagues, and exempted it from all manner of jurisdiction. This, I believe, is a falsity, but it is a falsity of a very ancient date; both the truth and the fiction contained in that life are relative to the customs and laws of those times, and it is these customs of and laws we are investigating.

Clotarius II. orders the * bishops or the nobility who are possessed of estates in distant parts, to chuse upon the very spot those who are to administer justice, or to receive the judiciary emolu-

ments.

The same 4 prince regulates the judiciary power between the ecclesiastic courts and his officers. The capitulary of Charlemagne in the year 802 prescribes to the bishops and abbots, the qualifications necessary for their officers of justice. Another capitulary + of the same prince inhibits the royal officers

† Tabulariis. ‡ Mallum.

Vita St. Germeri Episcopi Tolosani apud Bollandianos, 16. Maii.

See also the life of St. Melanius, and that of St.

Deicola.

* In the council of Paris, in the year 615. Episcopi vel potentes, qui in aliis possident regionibus, judices vel missos discussores de aliis provinciis non instituunt, nisi de loco qui justitiam percipiant & aliis reddant. Art. 19. See also art. 12.

4 Ibid. art. 5.

- In the law of the Lombards, book 2. tit. 44. c. 2. Lindembroek's edition.

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to exercise any jurisdiction over those who are employed in manuring church lands, except they entered into that state by fraud, and to exempt themselves from contributing to the public charges. Another || ordains that the churches should have both criminal and civil jurisdiction over those who live upon their lands. In fine, as the capitulary of Charles the Bald distinguishes between the king's jurisdiction, that of the lords, and that of the church; I shall say nothing surther * upon this subject.

CHAP. XXII.

That the jurisdictions were established before the end of the second race.

IT has been pretended, that the vassals usurped the jurisdiction in their seigniories, during the disorders of the second race. Those who chuse rather to form a general proposition than to examine it, found it easier to say that the vassals did not possess, than to discover how they came to possess. But the jurisdictions do not owe their origin to usurpations;

‡ Servi Aldiones, libellarii antiqui, vel alii noviter facti. Ibid.

A capitulary of the year 806; it is added to the law of the Bavarians, art. 7. See also part 3. Lindembroek's edition, p. 444. Imprimis omnium jubendum est, ut habeant ecclesiae earum justitias, & in vita illorum qui habitant in ipsis ecclesiis, et post tam in pecuniis quam et in substantiis earum.

§ In the year 857, in fynodo apud Carifiacum, art.

4. edition of Balusius, p. 96.

* See the letter written by the bishops assembled at Rheims in the year 858, art. 7. in the capitularies, Balusius's edition, p. 108. Sicut illæ res'et sacultates in quibus vivunt clerici, ita et illæ sub consecratione immunitatis sunt de quibus debent militare vassali, &c.

they are derived from the primitive establishment,

and not from its corruption.

"He who kills a freeman," fays the law of the Bavarians, "fhall pay a composition to his re-"lations, if he has any; if not, he shall pay it to "the duke, or to the person under whose protec-"tion he had put himself in his lifetime." It is well known what it was to put one's self under the protection of another for a benefice.

"He who has been robbed of his bondman," fays the law of the Allemans ‡, "fhall have re"course to the prince to whom the robber is sub"ject; to the end that he may obtain a compo-

" fition."

"If a centenarius," fays || the decree of Childebert, "finds a robber in another hundred than his own, or in the limits of our faithful vassals, and does not drive him out, he shall represent the robber, or purge him by oath." There was therefore a difference between the district of the centenarii and that of the vassals.

This decree § of Childebert explains the constitution of Clotarius in the same year, which being given for the same case and sact, differs only in the

† Tit. 3. chap. 13. Lindembroek's edition.

‡ Tit. 85.

In the year 595, art. 11. & 12. edition of the capitularies by Balusius, p. 19. Pari conditione convenit, ut si una centena in alia centena vestigium secuta suerit et invenerit, vel in quibuscunque sidelium nostrorum terminis vestigium miserit, et ipsum in aliam centenam minime expellere potuerit, aut convictus reddat latronem, &c.

§ Si vestigium comprobatur latronis, tamen præsentia nihil longe mulctando; aut si persequens latronem suum comprehenderit, integram sibi compositionem accipiat. Quod si in truste invenitur, medietatem compositionis trustis adquirat, & capitale exigat a latrone. Art. 2, et. 3.

terms; the constitution calling in truste, what by the decree is called in terminis fidelium nostrorum. Meffieurs Bignon and Ducange*, who pretend that in truste fignified another king's demesne, are mistaken in their conjecture.

But, to finish the dispute at once, the second race was neither in disorder nor in its decline under Charlemagne: during his reign there were no usur-If then the patrimonial jurifdictions were established in his time, this convenient system falls

of itself to the ground.

Pepin, king of Italy, in a constitution + that had been made as well for the Franks as for the Lombards, after imposing penalties on the counts and other royal officers for prevarications or delays in the administration of justice, ordains ‡ that if it happens that a Frank or a Lombard possessed of a fief is unwilling to administer justice; the judge to whose district he belongs, shall suspend the exercise of his fief, and in the mean time either the judge or his commiffary shall administer justice.

It appears by a capitulary | of Charlemagne, that the kings did not levy the freda in all places. Another & capitulary of the same prince repeals several articles of the Salic, Burgundian, and Roman law,

* See the glossary on the word trustis.

+ Inserted in the law of the Lombards, book. 2. tit. 52. § 14. it is the capitulary of the year 793, in Ba-

lufius, p. 544. art. 10.

† Et si forsitan Francus aut Longobardus habens beneficium justitiam facere noluerit, ille judex in cujus ministerio fuerit, contradicat illi beneficium fuum, interim dum ipfe aut miffus ejus justitiam faciat. See also the same law of the Lombards, book 2. tit. 52. § 2. which relates to the capitulary of Charlemagne in the year 779, art. 21.

The third of the year 81. art. 10.

of The second of the year 813. Balusius's edition pag. 506.

to the end that his † vaffals may observe an uniformity in the administration of justice. By another
* of the same prince we find the seudal laws, and
seudal court already established. Another of Lewis
le Debonnaire ordains, that when a person possessed
of a fief does not administer justice ‡, or hinders
it from being administered, the king's commissaries
shall live upon him at discretion, till justice be administered. I shall likewise quote two || capitularies
of Charles the Bald, one of the year 861; where
we find the particular jurisdictions established, with
judges and subordinate officers; and the other § of
the year 864, where he makes a distinction between his own seigniories and those of private
people.

We have not the original grants of the fiefs, because they were established by the division which is known to have been made among the conquerors. It cannot therefore be proved by original contracts, that the jurisdictions were at first annexed to the fiefs: but if in the formularies of the confirmations, or of the translations of those fiefs in perpetuity, we find, as already has been observed, that the juris-

† Ut unusquisque fidelis justitias ita faceret. Ibid.

* The fecond capitulary of the year 813.

† Capitulare quintum anni 819, art. 23. Balusius's edition, p. 617. Ut ubicunque missi, aut episcopum, aut abbatem, aut alium quemlibet honore præditum invenerint, qui justitiam facerit noluit vel prohibuit, de ipsus rebus vivant quamdiu in eo loco justitias facere debent.

|| Edictum in Carifiaco in Balusius, tom. 2. pag. 152. Unusquisque advocatus pro omnibus de sua advocatione.... in convenientia, ut cum ministerialibus de sua advocatione quos invenerit contra hunc bannum nostrum

fecife ... caftiget.

§ Edictum Pistense, art. 18. Balusius's edition, tom. 2. p. 181. Si in siscum nostrum, vel in quamcunque immunitatem, aut alicujus potentis potestatem vel proprietatem consugerit, &c.

diction

diction was there established; this judiciary right must certainly have been inherent in the fief, and

one of its chief prerogatives.

We have a far greater number of records that establish the patrimonial jurisdiction of the clergy in their districts, than we have to prove that of the benefices or fiefs of the feudal lords; for which there are two reasons. The first, that most of the records now extant were preserved or collected by the monks, for the use of their monasteries. The fecond, that the patrimony of the feveral churches having been formed by particular grants, and by a kind of exception to the order established, they were obliged to have charters granted to them; whereas the concessions made to the feudal lords being confequences of the political order, they had no occasion to demand, and much less to preserve a particular charter. Nay, the kings were oftentimes fatisfied with making a fimple delivery with the sceptre, as appears by the life of St. Maur.

But the third formulary * of Marculfus sufficiently proves that the privilege of immunity, and consequently that of jurisdiction, were common to the clergy and the laity, since it is made for

both.

CHAP. XXIII.

General idea of the Abbe du Bos's book on the establishment of the French monarchy in Gaul.

Before I finish this book, it will not be improper to inquire a little into the Abbe du Bos's work, because my notions are perpetually contrary to his; and if he has hit on the truth, I must have missed it.

^{*} Lib. 1. Si beneficia opportuna locis ecclesiarum, aut cui voluerit decene....

This work has imposed upon a great many people, because it is written with a vast deal of art; because the point in question is constantly supposed; because the more it is deficient in proofs, the more it abounds in probabilities; and, in fine, because an infinite number of conjectures are laid down as principles, and from thence other conjectures are inferred as consequences. The reader forgets he has been doubting, in order to begin to believe. And as a prodigious fund of erudition is interspersed, not in the fystem, but around it, the mind is taken up with the appendages, and neglects the principal. Besides such a vast multitude of researches hardly permit one to imagine that nothing has been found; the length of the way makes us think that we are arrived at our journey's end.

But when we examine thoroughly, we find an immense colossus with earthen seet; and it is the earthen seet that render the colossus immense. If the Abbe du Bos's system had been well grounded, he would not have been obliged to write three huge volumes to prove it; he would have found every thing within his subject; and without wandering on every side in quest of what was extremely soreign to it, even reason itself would have undertaken to range this in the same chain with the other truths. Our history and laws would have told him; Do not take so much trouble, we shall be your

vouchers.

CHAP. XXIV.

The same subject continued. Resections on the main part of the system.

THE Abbe du Bos endeavours by all means to explode the received opinion that the Franks made the conquest of Gaul. According to his fystem, our kings were invited by the people, and only

only substituted themselves in the place, and succeeded to the rights of the Roman emperors.

This pretention cannot be applied to the time when Clovis, upon his entering Gaul, took and plundered the towns; neither is it applicable to the time when he defeated Syagrius the Roman commander. and conquered the country which he held: it can therefore be referred only to the time when Clovis, already master of a great part of Gaul by open force. was called by the choice and affection of the people to the fovereignty over the rest of the country. And it is not enough that Clovis was received, he must have been called; the Abbe du Bos must prove that the people chose rather to live under Clovis, than under the domination of the Romans, or under their own laws. Now, the Romans belonging to that part of Gaul not yet invaded by the barbarians, were, according to this author, of two forts; the first were of the Armorican confederacy, who had driven away the emperor's officers, in order to defend themselves against the barbarians, and to be governed by their own laws; the second were subject to Now, does this gentleman the Roman officers. produce any convincing proof that the Romans, who were still subject to the empire, called in Clovis? Not one. Does he prove that the republick of the Armoricans invited Clovis, or even concluded any treaty with him? Not at all. So far from being able to tell us the fate of this republic, he cannot even fo much as prove its existence; and notwithstanding he pretends to trace it from the time of Honorius to the conquest of Clovis, notwithstanding he relates with a most admirable exactness of all the events of those times; still this republic remains invisible in ancient authors. there is a wide difference between proving by a paffage of Zozimus t, that under the emperor Honorius the † country of Armorica and the other provinces of Gaul revolted, and formed a kind of republic; and shewing us, that, notwithstanding the different pacifications of Gaul, the Armoricans always formed a particular republic, which continued till the conquest of Clovis; and yet this is what he should have shown by strong and substantial proofs, in order to establish his system. For when we behold a conqueror entering a country, and subduing a great part of it by force and open violence, and soon after we find the whole country subdued, without any mention in history of the manner of its being effected, we have sufficient reason to believe that the affair ended as it began.

When we find he has mistaken this point, it is easy to perceive that his whole system falls to the ground; and as often as he infers a consequence from these principles, that Gaul was not conquered by the Franks, but that the Franks were invited by

the Romans, we may fafely deny it.

This author proves his principle, by the Roman dignities with which Clovis was invested: he infists that Clovis succeeded to Chilperic his father in the office of magister militie. But these two offices are merely of his own creation. St. Remigius's letter to Clovis, on which he grounds his opinion ||, is only a congratulation upon his accession to the crown. When the intent of a writing is so well known, why should we give it another turn?

Clovis, towards the end of his reign, was made conful by the emperor Anastasius; but what right could he receive from an authority that lasted only one year? It is very probable, says our author, that in the same diploma the emperor Anastasius made Clovis proconsul. And, I say, it is very

[†] Totusque tractatus Armoricus, alizque Galliarum provincia. Ibid.

Tom. 2. book. 3. chap. 18. p. 270.

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probable, he did not. With regard to a fact for which there is no foundation, the authority of him who denies, is equal to that of him who affirms. But I have also a reason for denying it. Gregory of Tours, who mentions the consulate, says never a word concerning the proconsulate. And even this proconsulate could have lasted only about six months. Clovis died a year and a half after he was made consul; and we cannot pretend to make the proconsulate an hereditary office. In sine, when the consulate, and, if you will, the proconsulate were conserved upon him, he was already master of the monarchy, and all his rights were established.

The fecond proof alleged by the Abbe du Bos, is the renunciation made by the emperor Justinian, in favour of the children and grandchildren of Clovis, of all the rights of the empire over Gaul. I could fay a great deal concerning this renunciation. We may judge of the regard shewn to it by the kings of the Franks, from the manner in which they performed the conditions of it. Befides, the kings of the Franks were masters, and peaceable sovereigns of Gaul: Justinian had not one foot of ground in that country; the western empire had been destroyed a long time before; and the eastern empire had no right to Gaul, but as reprefenting the emperor of the west. These were rights to rights; the monarchy of the Franks was already founded; the regulation of their establishment was made, the reciprocal rights of the perfons, and of the different nations who lived in the monarchy, were agreed on; the laws of each nation were given, and even reduced into writing. What could therefore that foreign renunciation avail to a government already established?

What can the Abbe du Bos mean by making such a parade of the declamations of all those bishops, who in the midst of the disorder, confusion, and total subversion of the state, as well as in the rava-

ges of conquest, endeavour to flatter the conqueror? What elfe is implied by flattering, but the weakness of him who is obliged to flatter? What does rhetoric and poetry prove, but the use of those very arts? Is it possible to help being surprised at Gregory of Tours, who, after mentioning the affaffinations committed by Clovis, fays, that God laid his enemies every day at his feet, because he walked in his ways? Who doubts but the clergy were glad of Clovis's conversion, and that they even reaped great advantages from it; but who doubts, at the same time, that the people experienced all the miseries of conquest, and that the Roman government submitted to that of the Franks? The Franks were neither willing nor able to make a total change; and few conquerours were ever feized with fo great a degree of madness. But to render all the Abbe du Bos's consequences true, they must not only have made no change amongst the Romans, but they must have even changed themselves.

I could undertake to prove, by following this author's method, that the Greeks never conquered Persia. I would set out with mentioning the treaties which some of their cities concluded with the Persians: I would mention the Greeks who were in Persian pay, as the Franks were in the pay of the Romans. And if Alexander entered the Persian territories, besieged, took, and destroyed the city of Tyre, it was only a particular affair like that of Syagrius. But, behold, the Jewish pontiff goes out to meet him. Listen to the oracle of Jupiter Hammon. Recollect how he had been predicted at Gordium. See what a number of towns croud, as it were, to fubmit to him; and how all the fatraps and grandees come to pay him obeifance. He puts on the Persian dress; this is Clovis's confular robe. Does not Darius offer him one half of his kingdom? Is not Darius affaffinated like a 3 E 2

tyrant? Do not the mother and wife of Darius weep at the death of Alexander? Were Quintus Curtius, Arrian, or Plutarch Alexander's cotemporaries? Has not the invention of * printing afforded us great lights, which those authors wanted? Such is the history of the establishment of the French monarchy in Gaul.

CHAP. XXV.

Of the French nobility.

THE Abbe du Bos maintains, that, at the commencement of our monarchy, there was only one order of citizens among the Franks. This affertion, so injurious to the noble blood of our principal families, is equally affronting to the three great houses which successively governed this realm. The origin of their grandeur would not therefore be lost in oblivion, night, and time. History would point out the ages when they were common families; and to make Childeric, P. pin, and Hugh Capet gentlemen, we should be obliged to trace their prodigree among the Romans or Saxons, that is, among the conquered nations.

This author grounds + his opinion on the Salic law. By this law, he fays, it plainly appears, that there were not two different orders of citizens among the Franks: it allowed a composition ‡ of two hundred sous for the murder of any Frank whatsoever; but among the Romans it distinguished the king's guest, for whose death it gave a com-

^{*} See the preliminary discourse of the Abbe du Bos.

⁺ See the establishment of the French monarchy, vol. 3. book 6. chap. 4. p. 304.

[†] He cites the 44th title of this law, and the law of the Ripuarians, tit. 7. and 36.

position of three hundred sous, from the Roman proprietor to whom it granted a hundred, and from the Roman tributary to whom it gave only a composition of forty-five. And as the difference of the compositions formed the principal distinction, he concludes, that there was but one order of citizens among the Franks, and three among the Romans,

It is aftonishing that his very miffake did not fet him right, In fact, it would have been vaftly extraordinary that the Roman nobility, who lived under the domination of the Franks, should have a larger composition, and been persons of much greater importance than the most illustrious among the Franks, and their greatest general. What probability is there, that the conquering nation should have so little respect for themselves, and so great a regard for the conquered people? Befides, our author quotes the laws of other barbarous nations, which prove that they had different orders of citizens. Now, it would be very extraordinary indeed that this general rule should have failed only among the Franks: This ought to have made him conclude either that he did not rightly understand, or that he misapplied the passages of the Salic law; which is actually the cafe.

Upon opening this law, we find that the compofition for the death of an antrustio *, that is, of the king's vassal, was six hundred sous: and that for the death of a Roman, who was the † king's guest, was

^{*} Qui in truste dominica est, tit. 44. § 4; and this relates to the 13th formulary of Marculfus, de regis antrustione See also title 66. of the Salic law, § 3. & 4.; and the title 74.; and the law of the Ripuarians, tit. 11.; and the capitulary of Charles the Bald apud Carisiacum, in the year 877, chap. 20.

only three hundred. We find there that * the composition for the death of an ordinary Frank † was two hundred sous; and for the death of an ordinary Roman ‡, only one hundred. For the death of a Roman || tributary, who was a kind of bondman or freedman, they paid a composition of forty-five sous: But I shall take no notice of this, no more than of the composition for the murder of a Frank bondman or of a Frank freedman, because this third order of persons is out of the question.

What does our author do? He is quite filent in respect to the first order of persons among the Franks; that is, the article relating to the antrustios; and afterwards, upon comparing the ordinary Frank, for whose death they paid a composition of two hundred sous, with those whom he distinguishes under three orders among the Romans, and for whose death they paid different compositions, he finds that there was only one order of citizens among the Franks, and that there were three among the Romans.

As this gentleman is of opinion that there was only one order of citizens among the Franks, it would have been lucky for him that there had been only one order also among the Burgundians, because their kingdom constituted one of the principal parts of our monarchy. But in their codes §

† Tit. 44. § 1.

^{*} Salic law, tit. 44. § 4.

[†] Tit. 44. § 15. | Salic law, tit. 44. § 7.

Si quis quolibet casu dentem optimati Burgundioni vel Romano nobili excusserit, solidos viginti quinque cogatur exsolvere; de mediocribus personis ingenuis, tam Burgundionibus quam Romanis, si dens excussus fuerit, decem solidis componatur; de inserioribus personis, quinque solidis. Art. 1, 2, & 3. tit. 26. of the law of the Burgundians.

we find three forts of compositions, one for the Burgundian or Roman nobility, the other for the Burgundians or Romans of a middling condition, and the third for those of a lower rank in both na-

tions. He has not quoted this law.

It is very extraordinary to fee in what manner he evades those * passages which press him hard on all fides. If you speak to him of the grandees, lords. and the nobility; these, he says, are mere distinctions of respect, and not of order; they are things of courtefy, and not prerogatives of law; or elfe, he favs, those people belonged to the king's council; nay, they possibly might be Romans: But still there was only one order of citizens among the Franks. On the other hand, if you speak to him of fome Franks of an inferiour rank +, he fays, they are bondmen; and thus he interprets the decree of Childebert. But I must stop here a little, to inquire further into this decree. Our author has rendered it famous by availing himself of it, in order to prove two things: The one t, that all the compositions we meet with in the laws of the Barbarians were only civil interests added to corporal punishments, which entirely subverts all the ancient records; the other, that all freemen were judged directly and immediately by the king ||, which is contradicted by an infinite number of paffages and authorities that inform us of the \(\) judiciary order of those times.

^{*} Establishment of the French monarchy, vol. 3. book vi. chap. 4, & 5.

[†] Ibid. chap. 5. page 319, & 320. † Ib. chap. 4. page 307, & 308.

[|] Ib. page 309, and in the following chapter, page 319, & 320.

[§] See the 28th book of this work, chap. 28. and the 31st book, chap. 8.

This decree, which was made in an affembly * of the nation, fays, that if the judge finds a notorious robber, he must command him to be tied, in order to be carried before the king, si Francus fuerit; but if he is a weaker person, (debilior persona), he thall be hanged upon the fpot. According to the Abbé du Bos, Francus is a freeman, debilior persona is a bondman. I shall defer entering, for a moment into the fignification of the word Francus, and begin with examining what can be understood by these words, a weaker person. In all languages whatfoever, every comparative necessarily supposeth three terms, the greatest, the lesser, and the smalleft. If none were here meant but freemen and bondmen, they would have faid a bondman, and not a man of a leffer power. Wherefore debilior perfona does not fignify a bondman, but a person of a fuperior condition to a bondman. Upon this fupposition, Francus cannot mean a freeman, but a powerful man; and this word is taken here in that acceptation, because among the Franks there were always men who had a greater power in the state, and it was more difficult for the judge or count to chastise them. This explication agrees very well with a great number of capitularies +, where we find the cases in which the criminals were to be carried before the king, and those in which it was otherwife.

We find in the life of Lewis le Debonnaire ;;

+ See the 28th book of this work, chap. 28.; and

the 31st book, chap. 8.

^{*} Itaque colonia convenit & ita bannivimus, ut unusquisque judex criminosum latronem ut audierit, ad casam suam ambulet, & ipsum ligare faciat; ita ut si Francus suerit, ad nostram præsentiam dirigatur; & si debilior persona suerit, in loco pendatur. Capitulary of Balusius's edition, tome 1. page 19.

[‡] Chap. 43, & 44.

written by Tegan, that the bishops were the principal cause of the humiliation of this emperour, especially those who had been bondmen, and those who were born among the barbarians. Tegan thus addresses Hebo, whom this prince had drawn from the state of servitude, and made archbishop of Rheims. "What recompence * did the emperour receive from you for so many benefits? He made you a freeman, but did not ennoble you, because he could not give you nobility after having given

" you your liberty."

This discourse, which proves so strongly the two orders of citizens, does not at all confound the Abbé du Bos. He answers thus +: "The meaning " of this paffage is not, that Lewis le Debonnaire " was incapable of introducing Hebo into the or-" der of the nobility. Hebo, as archbishop of " Rheims, must have been of the first order, su-" periour to that of the nobility." But I leave the reader to judge whether this be not the meaning of that passage; I leave him to judge whether there can be any question here concerning a precedency of the clergy over the nobility. "This passage " proves only, continues the same writer 1, that the freeborn subjects were qualified as noble-" men; in the common acceptation, noblemen " and men who are freeborn, have, for this long " time, fignified the fame thing." What! because fome of our burghers have lately affumed the quality of noblemen, shall a passage of the life of Lewis le Debonnaire be applied to this fort of people? " And perhaps, continues he still ||, Hebo had not

^{*} O qualem numerationem reddidisti ei! fecit te liberum, non nobilem, quod impossible est post libertatem. Ibid.

[†] Establishment of the French monarchy, vol. 3. book vi chap. 4. page 3, 6.

t Ibid. | Ibid Vol. II. | 3 F

" been a bondman among the Franks, but among " the Saxons, or some other German nation, " where the people were divided into feveral or-" ders." Then because of the Abbé du Bos's perhaps there must have been no nobility among the nation of the Franks. But he never applied a perhaps fo badly. We have feen that Tegan * diftinguishes the bishops, who had opposed Lewis le Debonnaire, fome of whom had been bondmen, and others of a barbarous nation. Hebo belonged to the first, and not to the second. Besides, I do not fee how a bondman, fuch as Hebo, can be faid to have been a Saxon or a German; a bondman has no family, and confequently no nation. Lewis le Debonnaire manumifed Hebo; and as bondmen, after their manumission, embraced the law of their masters, Hebo was become a Frank, and not a Saxon or German.

I have been hitherto acting offensively; it is now time to defend myself. It will be objected to me. that indeed the body of the antrustios formed a distinct order in the state, from that of the freemen: But as the fiefs were at first precarious, and afterwards for life; this could not form a nobleness of descent, since the prerogatives were not annexed to an hereditary fief. This is the objection which induced M. de Valois to think, that there was only one order of citizens among the Franks; an opinion which the Abbé du Bos has borrowed of him. and which he has absolutely spoiled with so many bad arguments. Be that as it may, it is not the Abbé du Bos that could make this objection. For after having given three orders of Roman nobility. and the quality of the king's guest for the first, he could not pretend to fay, that this title was a

* Omnes episcopi molesti suerunt Ludovico, et maxime ii quos e servili conditione honoratos habebat, cum his qui ex barbaris nationibus ad hoc sastigium perducti sunt. De gestis Ludovici Pii, cap. 43, & 44-greater

greater mark of a noble descent than that of antrustio. But I must give a direct answer. antrustios, or trusty men, were not fuch, because they were possessed of a fief, but they had a fief given them because they were antrustios or trusty men. The reader may please to recollect what has been faid in the beginning of this book. They had not at that time, as they had afterwards, the fame fief: But if they had not that, they had another: because the fiefs were given on account of their birth, and because they were often given in the affemblies of the nation; and in fine, because as it was the interest of the nobility to have them, it was likewise the king's interest to give them. These families were distinguished by their dignity of trusty men, and by the prerogative of being qualified to vow fealty for a fief. In the following book *, I shall shew, that by the circumstances of time there were freemen, who were permitted to enjoy this great prerogative, and confequently to enter into the order of nobility. It was not fo at the time of Gontram, and his nephew Childebert; but so it was at the time of Charlemagne. But though, in that prince's reign, the freemen were not incapable of possessing fiefs, yet it appears by the above-cited paffage of Tegan, that the freedmen were absolutely excluded. Will the Abbé du Bos +, who carries us to Turkey, to give us an idea of the ancient French nobility; will he, I fay, pretend that they ever complained in Turky of the elevation of people of low birth to the honours and dignities of the state, as they complained under Lewis le Debonnaire and Charles the Bald? There was no complaint of this kind under Charlemagne, because this prince always distinguished the

* Chap. 23.

[†] Establishment of the French monarchy, vol. 3. book vi. chap. 4. page 302.

Book XXXI.

ancient from the new families; which Lewis le De-

bonnaire and Charles the Bald did not.

The public should not forget the obligation it has to the Abbe du Bos for several excellent performances. It is by these works, and not by his history of the establishment of the French monarchy, we ought to judge of his merit. He fell into very great mistakes, because he had more in view the Count of Boulainvillier's works than his own subject.

From all these criticisms I shall draw only one reflection: If so great a man was mistaken, what

ought not I to fear ?

********BOOK XXXI.

Theory of the feudal laws among the Franks, in the relation they bear to the revolutions of their monarchy.

CHAP. I.

Changes in the offices and in the fiefs. Of the mayors of the palace.

THE counts at first were sent into the districts only for a year; but they soon purchased the continuation of their offices. Of this we have an example in the reign of Clovis's grandchildren. A person named Peonius * was count in the city of Auxerre; he sent his son Mommolus with money to Gontram, to prevail upon him to continue him in his employment; the son gave the money for himself, and obtained the father's place. The kings had already begun to spoil their own favours.

Though by the laws of the kingdom, the fiefs were precarious, yet they were neither given nor

^{*} Gregory of Tours, book 4. chap. 42.

taken away in a capricious and arbitrary manner; nay, they were generally one of the principal subjects debated in the national affemblies. It is natural however to imagine that corruption had seized this, as well as the other article; and that the possession of the siefs, like that of the counties, was conti-

nued for money.

I shall show, in the course of this book *, that, independently of the grants which the princes made for a certain time, there were others in perpetuity. The court wanted to revoke the grants that had been made: This occasioned a general discontent in the nation, and was soon followed with that revolution famous in the French history, whose first epoch was the amazing spectacle of the execution of Brunechild.

It appears at first extraordinary, that this queen, who was daughter, fifter, and mother to fo many kings, a princefs to this very day famous for works worthy of an ædile or a Roman proconful, born with an admirable genius for affairs, endowed with qualities fo long respected, should see herself + of a fudden exposed to so tedious, so shameful and cruel a punishment, by a ‡ king whose authority was but indifferently established in the nation; if fhe had not incurred that nation's displeasure for fome particular cause. Clotarius reproached | her with the murder of ten kings: But two of them he had put to death himself: The death of some of the others was owing to chance, or to the villainy of another queen; and a nation that had permitted Fredegunda § to die in her bed, that had even

+ Fredegarius's chronicle, chap. 43.

^{*} Chap. 7.

[‡] Clotarius II. fon of Chilperic, and father of Dagobert.

^{||} Fredegarius's chronicle, chap. 44.

See Gregory of Tours, book viii. chap. 31.

opposed the punishment of her flagitious crimes, ought to have been very indifferent in respect to those of Brunechild.

She was put upon a camel, and led ignominiously through the army; a certain fign that she had given great offence to that army. Fredegarius relates, that Protarius *, Brunechild's favourite, stripped the lords of their property, and filled the exchequer with the plunder; that he humbled the nobility, and that no person could be sure of continuing in any office or employment. The army conspired against him, and he was stabbed in his tent; But Brunechild, either by revenging † his death, or by pursuing the same plan, became every day more odious ‡ to the nation.

Clotarius, ambitious of reigning alone, inflamed moreover with the most furious revenge, and sure of perishing if Brunechild's children got the upper hand, entered into a conspiracy against himself; and whether it was owing to ignorance, or to the necessity of his circumstances, he became Brunechild's accuser, and made a terrible example of

that princefs.

Warnacharius had been the very foul of the confpiracy formed against Brunechild; being at that time mayor of Burgundy, he made | Clotarius con-

+ Ibid. cap. 28. in the year 607.

‡ Ibid. cap. 41. in the year 613. Burgundia farones, tam episcopi quam ceteri leudes, timentes Brunichildem, & odium in eum habentes, consilium inientes, &c.

| Ibid. chap. 42. in the year 613. Sacramento a Clotario accepto, ne unquam vitæ suæ temporibus degradaretur.

^{*} Sæva illi suit contra personas iniquitas, sisco nimium tribuens, de rebus personarum ingeniose siscum vellens implere—ut nullus reperiretur qui gradum quem arripuerat potuisset adsumere. Fredeg. chron. chap. 27. in the year 605.

fent that he should not be displaced while he lived. By this means the mayor could no longer be in the same case, as the French lords before that time; and this authority began to render itself indepen-

dent of the regal dignity.

It was Brunechild's unhappy regency which had exasperated the nation. As long as the laws subfifted in their full force, no one could complain for having been deprived of a fief, fince the law did not bestow it upon him in perpetuity. But when fiefs came to be acquired by avarice, by bad practices and corruption, they complained of being deprived, by irregular means, of things that had been irregularly acquired. Perhaps if the public good had been the motive of the revocation of these grants, nothing would have been faid: But they made a show of order, without concealing the corruption; the fifcal rights were claimed, in order to lavish the public treasure; and grants were no longer the reward or the encouragement of fer. vices. Brunechild, through a corrupt spirit, wanted to reform the abuses of the ancient corruption. Her caprices did not proceed from weakness; the vaffals and the great officers thinking themfelves in danger, prevented their own by her ruin.

We are far from having all the records of what was transacted in those days; and the writers of chronicles, who understood very near as much of the history of their time, as our country-clowns know of ours, were extremely barren. And yet we have a constitution of Clotarius, given in * the council of Paris for the reformation of † abuses, which shows

that

^{*} Some time after Brunehault's execution, in the year 615. See Balusius's edition of the capitularies, page 21.

[†] Quæ contra rationis ordinem acta vel ordinata funt, ne in antea, quod avertat Divinitas, contingant, disposuerimus,

that this prince put a ftop to the complaints that had occasioned the revolution. On the one hand, he confirms * all the grants that had been made or confirmed by the kings his predecessors; and, on the other, he ordains † that whatever had been taken from his vassals, should be restored to them.

This was not the only concession the king made in this council; he injoined, that whatever had been innovated, in opposition to the privileges of the clergy, should be corrected t; and he moderated the influence of the court in the | elections of bishops. He even reformed the fiscal affairs; ordaining that all the new & cenfuses should be abolished, and that they should not levy any + toll established fince the death of Gontram, Sigebert, and Chilperic; that is, he abolished whatever had been done during the regencies of Fredegunda and He forbade the driving of his cattle Brunechild. to + graze in private people's grounds; and we shall presently see that the reformation was still more general, and extended even to civil affairs.

disposuerimus, Christo præsule, per hujus edicti tenorem generaliter emendare. Ibid. art. 16.

* Ibid. art. 16. † Ibid. art. 17.

‡ Et quod per tempora ex hoc prætermissum est, vel

dehine perpetualiter observetur.

| Ita ut episcopo decedente, in loco ipsius, qui a metropolitano ordinari debet, cum principalibus, a clero & populo eligatur; & si persona condigna suerit, per ordinationem principis ordinetur; vel certe si de palatio eligitur, per meritum personæ & doctrinæ ordinetur. *Ibid. art.* 1.

§ Ut ubicunque census novus impie additus est, e-mendetur. Art. 8.

4 Ibid. art. 9.

+ 1b. art. 21.

CHAP. II.

How the civil government was reformed.

HITHERTO the nation had given marks of impatience and levity, in respect to the choice or conduct of her masters; she had regulated their differences, and obliged them to come to an agreement amongst themselves. But now she did what before was quite unexampled; she cast her eyes on her actual situation, examined the laws coolly, provided against their insufficiency, put a stop to vio-

lence, and moderated the regal power.

The masculine, bold, and insolent regencies of Fredegunda and Brunechild, had less surprised than warned the nation. Fredegunda had defended her villainies by new villainies; she had justified her poisonings and affassinations by poifonings and affaffinations; and had behaved in fuch a manner, that her outrages were rather of a private than public nature. Fredegunda did more mischief: Brunechild threatened more. this crifis, the nation was not fatisfied with fetting the feudal government to rights, she was also determined to fecure her civil government. For the latter was rather more corrupt than the former; and this corruption was fo much the more dangerous as it was more ancient, and depended more in some measure on the abuse of manners than on that of laws.

The history of Gregory of Tours shews us, on the one hand, a sierce and barbarous nation; and on the other, kings of as bad a character. These princes were bloody, unjust, and cruel, because all the nation were so. If Christianity seemed sometimes to soften them, it was only by the terrour which this religion imprints on the guilty; the church supported herself against them by the miracles and prodigies of her saints. The kings were Vol. II.

not addicted to facrilege, because they dreaded the punishments inflicted on facrilegious people: But, this excepted, they committed, either in their paffion or in cool blood, all manner of crimes and injustice, because in these the revengeful hand of the Deity did not appear so visible. The Franks. as I have already observed, bore with bloody kings, because they were fond of blood themselves; they were not affected with the wickedness and extortions of their princes, because this was their own character. There had been a great many laws established, but the king rendered them all useless. by a kind of letters called precepts *, which fubverted those laws: These were in the nature of the rescripts of the Roman emperors, whether it be that our kings borrowed this usage of them, or derived it from their own natural disposition. We see in Gregory of Tours, how they committed murders in cool blood, and put the accused to death, who had not been fo much as heard; they gave precepts + for illicit marriages; they gave them for transferring fuccessions; they gave them for depriving relations of their rights; and they gave them, in fine, to qualify men to marry confecrated virgins. They did not indeed make laws of their own authority, but they suspended the execution of those that had been already made.

Clotarius's constitution redressed all these grievances; no one ‡ could any longer be condemned without being heard; relations | were made to suc-

* They were orders which the king fent to the judges to do or to tolerate things contrary to law.

† See Gregory of Tours, book iv. page 227. Both our history and the charters are full of this; and the extent of these abuses appears especially in Clotarius's constitution, inserted in the edition of the capitularies made to reform them, Balusius's edition, page 7.

† Art. 22. | Ib. art. 6.

ceed according to the order established by law; all precepts for marrying religious women were made null *; and those who had obtained and made use of them, were severely punished. We might know perhaps more exactly his determinations with regard to these precepts, if the thirteenth and the two next articles of this decree had not been lost through the injury of time. We have only the first words of this thirteenth article, ordaining that the precepts shall be observed, which cannot be understood of those he had just abolished by the same law. We have another constitution + by the same prince, which is relative to his decree, and corrects, in the same manner, every article of the abuses of the precepts.

True it is that Balusius sinding this constitution without date, and without the name of the place where it was given, attributes it to Clotarius I. But I say it belongs to Clotarius II. for three reasons.

1. It says that the king will preserve the immunities ‡ granted to the churches by his father and grandfather. What immunities could the churches receive from Childeric grandfather of Clotarius I. who was not a Christian, and who lived even before the foundation of the monarchy? But if we attribute this decree to Clotarius II. we shall find his grandfather to have been this very Clotarius I. who made immense donations to the church, with a view of expiating the murder of his son Cramne,

^{*} Ib. art. 18.

[†] In Balusius's edition of the capitularies, tome 1,

[†] In the preceding book I have made mention of these immunities, which were grants of judicial rights, and contained prohibitions to the regal judges to perform any function in the territory, and were equivalent to the erection or grant of a fief.

whom he had ordered to be burnt, together with his wife and children.

2. The abuses redressed by this constitution, were still subsisting after the death of Clotarius I. and were even carried to their highest extravagance during the weakness of Gontram's reign, the cruelty of that of Chilperic, and the execrable regencies of Fredegunda and Brunechild. Now, is it possible that the nation could have bore with grievances, so solemnly proscribed, without ever complaining of the continual repetition of those grievances? Is it possible, that she could forbear doing at that time what she did afterwards, when Childeric II. * renewing the old oppressions, she pressed + him to ordain that the law and customs should be complied with as formerly in judicial proceedings.

In fine, as this conflitution was made to redress grievances, it cannot relate to Clotarius I. since there were no complaints of this kind in his reign, and his authority was well established throughout the kingdom, especially at the time in which they place this constitution; whereas it agrees very well with the events which happened during the reign of Clotarius II. which produced a revolution in the political state of the kingdom. We must clear up history by the laws, and the laws by history.

CHAP. III.

Authority of the mayors of the palace.

I Took notice that Clotarius II. had promifed not to deprive Warnacharius of his mayor's place during life. This revolution had another effect; before this time the mayor was the king's officer, but now he became the officer of the people he

+ See the life of St. Leger.

^{*} He began to reign towards the year 670.

was chosen before by the king, and now by the nation. Before the revolution, Protarius had been made mayor by Theodoric, and * Landeric by Fredegunda; but † after that the mayors were chosen

by the nation ‡.

We must not therefore confound, as some authors have done, these mayors of the palace with those who were possessed of this dignity before the death of Brunechild; the king's mayors with those of the kingdom. We see by the law of the Burgundians, that among them the office of mayor was not one of the || first in the state; nor was it one of the most eminent \u03c3 under the first kings of the Franks.

Clotarius removed the apprehensions of those who were possessed of employments and siefs; and when after the death of Warnacharius + he asked the lords assembled at Troyes, who is it they would put in his place; they cried out they would chuse

* Instigante Brunechilde, Theodorico jubente, &c. Fredegarius, chap. 27. in the year 605.

† Gesta regum Francorum, cap. 36.

‡ See Fredegarius, chronicle, chap. 54. in the year 626, and his anonymous continuator, chap. 101. in the year 695, and chap. 105. in the year 715. Aimoin, book iv. chap. 15. Eginhard, life of Charlemagne, chap. 48. Gesta regum Francorum, chap. 45.

See the law of the Burgundians in praf. and fup-

plement 2. to it, tit. 13.

§ See Gregory of Tours, book ix. chap. 36.

4 Eo anno Clotarius cum proceribus et leudibus Burgundiæ Trecassinis conjungitur: Cum eorum esset solicitus, si vellent, jam Warnachario discesso, alium in ejus honoris gradum sublimare: Sed omnes unanimiter denegantes se nequaquam velle majorem domus eligere, regis gratiam obnixe petentes, cum rege transegere. Fredegarius, chronicle, chap. 54. in the year 626.

no one, and petitioning for his favour, they en-

trusted themselves entirely into his hands.

Dagobert reunited the whole monarchy in the fame manner as his father; the nation had a thorough confidence in him, and appointed no mayor. This prince finding himself at liberty, and elated by his victories, refumed Brunechild's plan. But this succeeded so ill, that the vasials of Austrasia let themselves * be beaten by the Sclavonians, and returned home; so that the marches of Austrasia were left a prey to the barbarians.

He determined then to make an offer to the Auftrasians, of resigning Austrasia to his son Sigebert, together with a treasure, and to put the government of the kingdom and of the palace, into the hands of Cunibert bishop of Cologne, and of the Duke Adalgisus. Fredegarius does not enter into the particulars of the conventions then made; but the king confirmed them all by charters, and † Austrasia was immediately secured from danger.

Dagobert finding himself near his last end, recommended his wife Nentechildis, and his son Clovis to the care of Æga. The vassals of Neustria and Burgundy chose ‡ this young prince for their king. Æga and Nentechildis had the government of || the palace; they restored § whatever Dagobert

* Istam victoriam quam Winidi contra Francos meruerunt, non tantum Sclavinorum fortitudo obtinuit, quantum dementatio Austrasiorum, dum se cernebant cum Dagoberto odium incurrisse, & assidue expoliarentur. Fredegarius, chronicle, chap. 68. in the year 630.

† Deinceps Austrasii, eorum studio, limitem & regnum Francorum contra Winidos utiliter desensasse no-scuntur. Fredegarius's chronicle, chap. 75. in the year

† Fredegarius's chronicle, chap. 79. in the year 638.

| Ibid. § Ibid. chap, 80. in 639.

had taken; and complaints ceased in Neustria and Burgundy, as they had ceased before in Austrasia.

After the death of Æga, the queen Nentechildis § engaged the lords of Burgundy to chuse Floachatus for their mayor. The latter dispatched letters to the bishops and chief lords of the kingdom of Burgundy, by which he promised to preserve their honours and dignities ‡ for ever, that is, during life. He confirmed his word by oath. This is the period, at which ‡ the author of the treatise of the mayors of the palace fixes the administration of the kingdom by those officers.

Fredegarius being a Burgundian, has entered into a more minute detail as to what concerns the mayors of Burgundy, at the time of the revolution of which we are speaking, than as to what relates to the mayors of Austrasia and Neustria. But the conventions made in Burgundy were, for the very same reasons, agreed to in Neustria and Austrasia.

The nation thought it fafer to lodge the power in the hands of a mayor, whom she chose herself, and to whom she might prescribe conditions, than in those of a king whose power was hereditary.

§ Ibid. chap. 89. in the year 641.

4 Ibid. cap. 89. Floachatus cunctis ducibus a regno Burgundiæ seu et pontificibus, per epistolam etiam et sacramentis sirmavit unicuique gradum honoris & dignitatem, seu et amicitiam, perpetuo conservare.

‡ Deinceps a temporibus Clodovei, qui fuit filius Dagoberti inclyti regis, pater vero Theodorici, regnum Francorum decidens, per majores domus cœpit ordinari. De majoribus domus regiæ.

CHAP. IV.

Of the genius of the nation in regard to the mayors.

A Government, in which a nation that had an hereditary king, chose a person who was to exercise the royal authority, seems very extraordinary: but independently of the circumstances of those times, I find that the notions of the Franks in this respect were derived from a higher source.

They were descended from the Germans, of whom Tacitus * says, that in the choice of their king they were determined by his nobility; and in that of their leader, by his valour. This gives us an idea of the kings of the first race, and of the mayors of the palace; the former were hereditary,

the latter elective.

No doubt but those princes, who stood up in the assembly of the nation, and offered themselves as the conductors of an enterprise to such as were willing to follow them, united generally in their own person both the king's authority and the mayor's power. By their noble blood they had attained the royal dignity; and their valour having procured them several followers who pitched upon them for their leaders, this gave them the power of mayor. By the royal dignity our first kings presided in the courts and assemblies, and gave laws with the consent of those assemblies; by the dignity of duke or leader they entered upon expeditions, and commanded the armies.

In order to be acquainted with the genius of the primitive Franks in this respect, we have only to

^{*} Reges ex nobilitate, duces ex virtute sumunt. De moribus Germ.

cast an eye on the conduct + of Argobastes, a Frank by nation, on whom Valentinian had conferred the command of the army. He shut the emperour up in his own palace; where he would not fuffer any person whomsoever to speak to him concerning either civil or military affairs. Argobastes did at that time what was afterwards practifed by the Pepins.

CHAP. V.

In what manner the mayors obtained the command of the armies.

AS long as the kings commanded their armies in person, the nation never thought of chusing a leader. Clovis and his four fons were at the head of the Franks, and led them on through a long feries of Victories. Theobald fon of Theodobert, a young, weak, and fickly prince, was the first ‡ of our kings that confined himself to his palace: He refused to engage in an expedition in Italy against Narses, and he had | the mortification to see the Franks chuse themselves two chiefs, who led them against the enemy. Of the four sons of Clotarius I. Gontram & was the least fond of commanding his armies; the other kings followed this example; and, in order to intrust the command without

⁺ See Sulpicius Alexander in Gregory of Tours, book 2.

In the year 552.

Leutharis vero & Butilinus, tametsi id regi ipsorum minime placebat, belli cum eis focietatem inierunt. Agathias, book 1. Gregory of Tours, book 4.

[&]amp; Gontram did not even march against Gondovald, who flyled himself fon of Clotarius, and claimed his

share of the kingdom.

danger into other hands, they conferred it upon feveral chiefs or dukes *.

Innumerable were the inconveniencies which thence arose; all discipline was lost, no one would any longer obey. The armies were dreadful only to their own country; they were loaden with spoils, before they had reached the enemy. Of these miseries we have a very lively picture in Gregory of Tours †. How shall we be able to obtain a victory, said Gontram ‡, we who do not so much as keep what our ancestors acquired? Our nation is no longer the same. Strange, that it should be on the decline so early as the reign of Clovis's grandchildren!

It was therefore natural that they should determine at last upon an only duke, a duke who was to be vested with an authority over this prodigious multitude of seudal lords and vassals, who were now become strangers to their own engagements; a duke who was to establish the military discipline, and to put himself at the head of a nation unhappily practised in making war against itself. This power was conferred on the mayors of the palace.

The original function of the mayors of the palace was the management of the king's household. They had afterwards, in conjunction * with other officers,

* Sometimes to the number of twenty. See Gregory of Tours, book. 5. chap. 27. book. 8. chap. 18. and 30. book 10. chap. 3. Dagobert, who had no mayor in Burgundy, observed the same policy, and sent against the Gascons ten dukes, and several counts who had no dukes over them. Fredegarius's chronicle, cap. 78. in the year 636.

+ Gregory of Tours, book 8. chap. 30. and book

10. chap. 3.

± Ibid.

* See the fecond supplement to the law of the Burgundians, tit. 13. and Gregory of Tours, book 9. chap. 36.

the political government of the fiefs; and at length they obtained the fole disposal of them. They had also the administration of military affairs, and the command of the armies; and these two employments were necessarily connected with the other two. In those days it was much more difficult to raise than to command the armies; and who but the dispenser of favours could have this authority? In this martial and independent nation, it was prudent to invite, rather than to compel; prudent to give away or to promife the fiefs that should happen to be vacant by the death of the possessor; prudent, in fine, to reward continually, and to cause preferences to be dreaded. It was therefore right, that the person who had the superintendency of the palace, should also be general of the army.

CHAP. VI.

Second epocha of the humiliation of our kings of the first race.

A Fter the execution of Brunechild, the mayors were administrators of the kingdom under the kings; and though they had the management of the war, yet the kings were always at the head of the armies, and the mayor and the nation fought under their command. But the victory || of Duke Pepin over Theodoric and his mayor, completed & the degradation of our kings; and that * which Charles Martel obtained over Chilperic and his

[|] See the annals of Metz, in the year 687, and 688.

[§] Illis quidem nomina regum imponens, ipse totius regni habens, privilegium, &c. Annals of Metz, in the year 695.

^{*} Annals of Metz, in the year 719.

mayor Rainfroy, confirmed it. Auftrafia triumphed twice over Neustria and Burgundy; and the mayoralty of Austrasia being annexed as it were to the family of the Pepins, this mayoralty and family became greatly superiour to all the rest. The conquerors were then afraid left fome person of credit should seize the king's person, in order to excite disturbances. For this reason they kept + them in the royal palace as in a kind of prison, and once ayear they showed them to the people. There they made ordinances, but ‡ these were such as were dictated by the mayor; they answered ambassadors, but the mayor made the answers. This is the time mentioned by | historians of the government of the mayors over the kings, whom they held in fubjection.

The extravagant passion of the nation for Pepin's family went so far, that they chose one of his grand-sons, who was yet § an infant, for mayor; they put him over one Dagobert, that is, one phantom over another.

+ Sedemque illi regalem sub sua ditione concessit.

Ibid. anno 719.

‡ Ex chronico Centulesi, lib. 2. Ut responsa qua erat doctus, vel potius jussus, ex sua velut potestate, redderet.

Annals of Metz, anno 691. Anno principatus Pippini super Theodoricum.... Annals of Fuld, or of Laurishan, Pippinus dux Francorum obtinuit regnum Francorum per annos 27 cum regibus sibi subjectis.

§ Posthæc Theudoaldus filius ejus (Grimoaldi) parvulus, in loco ipsius, cum prædicto rege Dagoberto, majordomus palatii essectus est. The anonymous continuator of Fredegarius in the year 714, chap. 104.

CHAP. VII.

Of the great offices and fiefs under the mayors of the palace.

THE mayors of the palace were far from reviving the precariousness of posts and employments; for indeed their power was owing to the protection which in this respect they had granted to the nobility. Hence the great offices were continued to be given for life, and this usage was every day more firmly established.

But I have some particular reflections to make here in respect to siefs: and in the first place I do not question but most of them became hereditary from this time.

In the treaty of Andeli *, Gontram and his nephew Childebert engage to maintain the donations made to the vassals and churches by the kings his predecessors; and leave is given to the † wives, daughters, and widows of kings, to dispose by will and in perpetuity of whatever they hold of the exchequer.

Marculfus wrote his formularies at the time ‡ of the mayors. We find feveral # in which the kings

* Cited by Gregory of Tours, book 9. See also the edict of Clotarius II. in 615. art. 16.

+ Ut si quid de agris siscalibus vel speciebus atque præsidio, pro arbitrii sui voluntate, sacere aut cuiquam conserre voluerint, sixa stabilitate perpetuo conservetur.

‡ See the 24th and the 34th of the first book.

See the 14th formulary of the first book, which is equally applicable to the fiscal estates given directly and in perpetuity, or given at first as a benefice, and afterwards in perpetuity, sicut ab illo aut a sisco nostro fuit possessa. See also the 17th formula, ibid

made

eft date.

made donations both to the person and to his heirs: and as the formularies are images of the common actions of life, they prove that part of the siefs were become hereditary towards the end of the first race. They were far from having in those days the idea of an unalienable demesne; this is a modern thing, which they knew neither in theory nor practice.

In proof hereof we shall presently produce no less than positive facts; and if I can show a time in which there were no longer any benefices for the army, nor any funds for its support; we must certainly conclude that the ancient benefices had been alienated. The time I mean is that of Charles Martel, who sounded some new siefs which we should carefully distinguish from those of the earli-

When the kings began to make grants in perpetuity, either through the corruption which crept into the government, or by reason of the constitution itself, which continually obliged the kings to confer rewards; it was natural that they should begin with giving the perpetuity of the fiefs, rather than of the counties. For to deprive themselves of some acres of land was no great matter; but to renounce the right of disposing of the great offices, was divesting themselves of their very power.

CHAP. VIII.

In what manner the allodial estates were changed into fiefs.

THE manner of changing an allodial estate into a fief, may be seen in a formulary of Marculfus §. The owner of the land gave it to the king,

[§] Book 1. formulary 13.

who restored it to the donor by way of usufruct, or benefice, and then the latter nominated his heirs

to the king.

In order to find out the reasons which induced them thus to change the nature of the aliodia, I must trace the source of the ancient prerogatives of our nobility, a nobility who, for these eleven centuries, have been covered with dust, sweat and blood.

Those who were seised of siefs, enjoyed very great advantages. The composition for the injuries done them was greater than that of freemen. It appears by the formularies of Marculfus, that it was a privilege belonging to the king's vassal, that whoever killed him should pay a composition of six hundred sous. This privilege was established by the Salic law *, and by that of the Ripuarians †; and at the same time that these two laws ordained a composition of six hundred sous for the murder of the king's vassal, they gave but ‡ two hundred for the murder of a person freeborn, if he was a Frank or barbarian living under the Salic law; and only a hundred for a Roman.

This was not the only privilege belonging to the king's vaffals. When || a man was fummoned in court, and did not make his appearance, nor obey the judges orders, he was appealed before the king; and if he perfifted in his contumacy, he was excluded from § the kings protection, and no one was allowed to entertain him, or even to give him a morfel of bread. Now, if he was a perfon of an ordinary condition, his goods * were conficated;

^{*} Tit. 44. See also titles 66. § 3. and 4. and tit. 74. + Tit. 2.

[†] See also the law of the Ripuarians, tit. 7. and the Salic law, tit. 44. art. 1. and 4.

[|] Salic law, tit. 59. and 76.

[§] Extra fermonem regis. Salic law, tit. 59. and 76.

^{*} Ibid. tit. 59. § 1.

but if he was the king's vassal, they were not +. The first by his contumacy was deemed sufficiently convicted of the crime, the fecond was not; the former t for the smallest crimes was obliged to undergo the trial by boiling water, the latter | was condemned to this trial only in the cafe of murder: in fine, the king's vaffal & could not be compelled to fwear in court against another vasfal: These privileges augmented daily, and the capitulary of Carlomanus * does this honour to the king's vaffals, that they shall not be obliged to swear in person, but only by the mouth of their own vaffals. Besides, when a person who had these honours did not repair to the army, his punishment was to abstain from flesh-meat and wine as long as he had been abfent from the service; but a freeman 4 who neglected to follow his count, paid a composition + of fixty fous, and was reduced to a state of servitude till he paid it.

It is very natural therefore to think that those Franks who were not the king's vassals, and much more the Romans, became fond of entering into the state of vassalage; and that they might not be deprived of their demesnes, they devised the usage of giving their allodium to the king, of receiving it from him afterwards as a fief, and of nominating him to their heirs. This usage was always continued, and took place especially during the disorders

[†] Ibid. tit. 76. § 1.

^{‡ 1}bid. tit. 56. and 59.

[|] Ibid. tit. 76. § 1. § 1bid. tit. 76. § 2.

^{*} Apud Vernis Palatium, in the year 883, art. 4.

⁴ Capitulary of Charlemagne, in the year 812, art. 1, and 31.

⁺ Heribannum,

f the second race, when every body stood in need of a protector, and wanted to incorporate himself with || the other lords, and to enter, as it were, into the feudal monarchy, because the political no

longer existed.

This continued under the third race, as we find by several * charters; whether they gave their allodium, and resumed it by the same act: or whether it was declared an allodium, and afterwards acknowledged as a sief. These were called siefs of

refumption.

This does not imply, that those who were seised of siefs, administered them like prudent fathers of families; for though the freemen grew desirous of being possessed of siefs, yet they managed this sort of estates as usufructs are managed in our days. This is what induced Charlemagne, the most vigilant and attentive prince we ever had, to make a great many regulations † to hinder the siefs from being degraded in favour of allodial estates. This proves only that in his time most benefices were still only for life, and consequently that they took more care of the allodia, than of the benefices; but it is no argument that they did not chuse rather to be the king's bondmen than freemen. They might have reasons for disposing of a particular portion of

Non infirmis reliquit heredibus, fays Lambert d'Ardres in Du Cange, on the word Alodis.

* See those quoted by du Cange in the word Alodis, and those produced by Galland, in his treatise of allodial

lands, p. 14. and the following.

+ Second capitulary of the year 802, art. 10. and the 7th capitulary of the year 803, art. 3. the 1st capitulary incerti anni, art. 49. the 5th capitulary of the year 806, art. 7. the capitulary of the year 779, art. 29. and the capitulary of Lewis le Debonnaire, in the year 829. art. 1.

a fief, but they were not willing to be ftripped even

of their dignity.

I know likewise that Charlemagne complains in a certain capitulary ‡, that in some places there were people who gave away their siefs in property, and redeemed them afterwards in property. But I do not say, that they were not sonder of the property than of the usufruct; I mean only, that when they could convert an allodium into a sief, which was to descend to their heirs, and is the case of the formulary above mentioned, they had very great advantages in doing it.

CHAP. IX.

How the church lands were converted into fiefs.

THE use of the fiscal lands should have been only to serve as donations by which the kings were to encourage the Franks to undertake new expeditions, and by which, on the other hand, these fiscal lands were increased. This, as I have already observed, was the spirit of the nation; but these donations took another turn. There is still extant a speech of Chilperic, grandson of Clovis, in which he complains that almost all these lands had been already given away to the church. Our exchequer, says he, is impoverished, and our riches are transferred to the clergy +; none teign now but bishops, who live in grandeur, while our grandeur is over.

This was the reason that the mayors, who durst

† The 5th of the year 806. art. 8.

* In Gregory of Tours, book 6. chap. 46.

† This is what induced him to annul the testaments made in favour of the clergy, and even the donations of his father; Gontram re-established them, and made even new donations. Gregory of Tours, book 7. chap. 7.

not attack the lords, stripped the churches; and one of the † motives alleged by Pepin for entering Neustria, was his having been invited thither by the clergy, to put a stop to the incroachments of the kings, that is, of the mayors, who stripped the

church of all her possessions.

The mayors of Austrasia, that is, the family of the Pepins, had behaved towards the clergy with more moderation than those of Neustria and Burgundy. This is evident by our chronicles ‡, in which we see the monks eternally admiring the devotion and liberality of the Pepins. They themselves had been possessed of the first places in the church. One crow does not pull out the eyes of another; as || Chilperic said to the bishops.

Pepin subdued Neustria and Burgundy; but as his pretence for destroying the mayors and kings was the oppression of the clergy, he could not strip them without contradicting his own title, and show ing that he made a jest of the nation. However, the conquest of two great kingdoms, and the destruction of the opposite party, afforded him suffi-

cient means of fatisfying his generals.

Pepin made himself master of the monarchy, by protecting the clergy; his son Charles Martel could not maintain his power, but by oppressing them. This prince sinding that part of the regal and siscal lands had been given either for life, or in perpetuity to the nobility, and that the clergy, by receiving both from rich and poor, had acquired a great part even of the allodial estates, he stripped the church; and as the siefs of the sirst division were

[†] See the annals of Metz, in the year 687. Excitor imprimis querelis sacerdotum et servorum Dei, qui me sapius adierunt, ut pro sublatis injuste patrimoniis, &c.

[‡] See the annals of Metz. In Gregory of Tours.

no longer in being, he formed a fecond division *. He took for himself and for his officers the church lands, and the churches themselves; and put a stop to an evil which differed in this respect from ordinary evils, that, by being extreme, it was so much the more easy to cure.

CHAP. X.

Riches of the clergy.

CO great were the donations made to the clergy, that under the three races of our princes they must have possessed several times all the lands of the But if our kings, the nobility, and the kingdom. people, found the way of giving them all their estates, they found also the method of getting them back again. The spirit of religion founded a great number of churches under the first race; but the military spirit was the cause of their being given away afterwards to the foldiery, who divided them amongst their children. What a number of lands must have then been taken from the clergy's menjalia! The kings of the fecond race opened their hands, and made new donations to them; but the Normans, who came afterwards, plundered and ravaged all before them, perfecuting especially the priefts and monks, and continually fearthing out for abbeys and other religious foundations. In this fituation what a loss must the clergy have sustained! There were hardly ecclefiaftics left to demand the estates of which they had been deprived. There remained therefore for the religious piety of the third race, foundations enough to make, and lands to bestow. The opinions which were broached and

^{*} Karlus plurima juri ecclesiastico detrahens prædia, sisco sociavit, ac deinde militibus dispertivit. Ex chronico Centulensi, lib. 2.

fpread in those days would have deprived the laity of all their estates, if they had been but honest enough. But, if the clergy were full of ambition, the laity were not without theirs; if they gave their estates upon their death-bed to the church, their successours wanted to resume them. We meet with nothing but continual quarrels between the lords and the bishops, the gentlemen and the abbots; and the clergy must have been very hard set, since they were obliged to put themselves under the protection of certain lords, who defended them for a

moment, and afterwards oppressed them.

But now a better administration, which had been established under the third race, gave the clergy leave to augment their possessions: when the Calvinists sallied forth, and coined money of all the gold and silver they found in the churches. How could the clergy be sure of their estates, when they were not even sure of their persons? They were treating of controversal subjects, while their archives were burning. What did it avail them to demand again of a ruined nobility what these were no longer possessions. What they had mortgaged a thousand ways? The clergy have constantly acquired, constantly refunded, and yet are still acquiring.

CHAP. XI.

State of Europe at the time of Charles Martel.

CHarles Martel, who undertook to strip the clergy, found himself in a most happy situation. He was both seared and loved by the soldiery; whose interest he promoted, having the pretence of his wars against the Saracens. He was hated indeed by the clergy, but * he had no need of them.

^{*} See the annals of Metz.

The pope, to whom he was necessary, stretched out his arms to him. Every one knows the famous embassy * he received from Gregory III. These two powers were strictly united, because they could not do one without the other; the pope stood in need of the Franks to support him against the Lombards and the Greeks; the Franks had occasion for the pope, to serve for a barrier against the Greeks, and to embarrass the Lombards. It was impossible therefore for the enterprise of Charles

Martel to miscarry. St. Eucherius, bishop of Orleans, had a vision which frightned all the princes of that time, I must produce to this purpose the letter + written by the bishops assembled at Rheims to Lewis king of Germany, who had invaded the territories of Charles the Bald; because it will show us the state of things in those times, and the disposition of peoples mind. They fay t, " That St. Eucherius ha-" ving been fnatched up into heaven, he faw " Charles Martel tormented in the bottom of hell " by order of the faints, who are to affift with Je-" fus Christ at the last judgement; that he had " been condemned to this punishment before his " time, for having stript the churches of their pos-" fessions, and thereby rendered himself guilty of " the fins of all those who had endowed them; " that King Pepin had held a council upon this oc-

† Anno 858, apud Carifiacum; Balus. edit. tom.

1. p. 101.

^{*} Epistolam quoque, decreto Romanorum principium, sibi prædictus præsul Gregorius miserat, quod sese populas Romanus, relicta imperatoris dominatione, ad suam desensionem & invictum elementiam convertere voluisset. Annals of Metz, year 741. Eo pacto patrato, ut a partibus imperatoris recederet. Fredegarius.

i Ibid. art. 7. p. 109.

" casion; that he had ordered all the church-lands he could recover to be restored to the church: " that as he could get back only a part of them, " because of his disputes with Veirfre duke of A-" quitaine, he iffued out letters called pracaria * " in favour of the churches for the remainder, and " made a law that the laity should pay a tenth part " of the church-lands they poffeffed, and twelve " deniers for each house; that Charlemagne did " not give the church lands away, on the contrary " that he made a capitulary, by which he engaged. both for himself and for his successours, never " to give them away; that all they fay is commit-" ted to writing, and that a great many of them heard the whole related by Lewis le Debonnaire, " the father of those two kings."

King Pepin's regulation mentioned by the bishops, was made in the council held at Leptines †. The church found this advantage in it, that such as had received those lands, held them no longer but in a precarious manner, and moreover that she received the tithe or tenth part, and twelve deniers for every house that had belonged to her. But this was only a palliative, which did not remove the

diforder.

This even met with opposition, and Pepin was obliged to make another capitulary ‡, in which he

+ In the year 743. See the 5th book of the capitu-

laries, art. 3. Balufius's edition, p. 825.

^{*} Precaria, quod precibus utendum conceditur, fays Cujas in his notes upon the first book of fiefs. I find in a diploma of King Pepin, dated the 3d year of his reign, that this prince was not the first who established these precaria; he cites one made by the mayor Ebroin, and continued after his time. See the diploma of this king, in the 5th tome of the historians of France by the Benedictines, art. 6.

That of Metz in the year 756, art. 4.

injoins those who held any of those benefices to pay this tithe and duty, and even to keep up the houses belonging to the bishopric, or monastery, under the penalty of forseiting those possessions. Char-

lemagne | renewed the regulations of Pepin.

That part of the fame letter which fays, that Charlemagne promifed, both for himself and for his successor, never to divide again the church-lands among the soldiery, is agreeable to the capitulary of this prince, given at Aix-la-Chapelle, in the year 803, with a view of removing the apprehensions of the clergy upon this subject. But the donations already made were still * continued. The bishops very justly add, that Lewis le Debonnaire followed the example of Charlemagne, and did not give away the church-lands to the soldiery.

And yet the old abuses were carried to such a pitch, that the laity under the children † of Lewis le Debonnaire, introduced priests into their churches, or drove them away, without the consent of the bishops. The churches ‡ were divided amongst the next heirs, and when they were held in an indecent

|| See his capitulary in the year 803, given at Worms, Balufius's edition, p. 411. where he regulates the precarious contract: and that of Francfort, in the year 794, p. 267. art. 24. in relation to the repairing of the houses; and that of the year 800.

p. 330.

* As appears by the preceding note, and by the capitulary of Pepin king of Italy, where it fays, that the king would give the monasteries in fief to those who would vow fealty for fiefs: it is added to the law of the Lombards, book 3. tit. 1. § 3. to the Salic laws, collection of Pepin's laws in Echard, p. 195. tit. 26. art. 4.

† See the constitution of Lotarius I, in the law of

the Lombards, book 3. law 1. § 43.

‡ Ibid. § 44.

manner, the bishops * had no other remedy left than to remove the relics.

But by the capitulary † of Compiegne, it is enacted, that the commissary shall have a right to vifit every monastery, together with the bishop, by the consent ‡ and in presence of the person who holds it; and this general rule shows that the abuse

was general.

Not that there were laws wanting for the restitution of the church-lands. The pope having reproached the bishops for their neglect in regard to the re-establishment of the monasteries, they wrote to Charles the Bald || that they were not affected with this reproach, because they were not culpable; and they reminded him of what had been promised, resolved, and decreed in so many national assemblies. In fact, they quoted nine.

Still they went on disputing; till the Normans

came, and made them all agree.

CHAP. XII.

Establishment of the tithes.

THE regulations made under king Pepin had given the church rather hopes of relief, than effectively relieved her; and as Charles Martel found all the landed estates in the hands of the clergy, Charlemagne found all the church lands in the hands of the soldiery. The latter could not be

* See the constitution of Lotarius I. in the law of the Lombards, book iii. law 1. § 44.

+ Given the 28th year of the reign of Charles the Bald, in the year 868, Balufius's edition, page 203.

† Cum confilio & confensu ipsius qui locum retinet. Concilium apud Bonoilum, the 16th year of Charles the Bald, in the year 856, Balusius's edition, page 78.

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forced to restore what had been given them; and the circumstances of that time rendered the thing still more impracticable than it was of its own nature. On the other hand, Christianity ought not to perish for want of ministers *, churches, and instructions.

This was the reason of Charlemagne's establishing + the tithes, a new kind of property, which had this advantage in favour of the clergy, that as they were given particularly to the church, it was easier in process of time to know when they were

usurped.

Some have attempted to make this establishment of an earlier date; but the authorities they produce seem rather, I think, to prove the contrary. The constitution of Clotarius ‡ says only that they shall not raise certain # tithes on churchlands: So far then was the church from exacting tithes at that time, that its whole pretension was to

* In the civil wars which broke out at the time of Charles Martel, the lands belonging to the church of Rheims were given away to laymen; the clergy were left to thift as well as they could, fays the life of St. Remigius, Surius, tome 1. page 279.

† Law of the Lombards, book iii. tit. 3. § 1. & 2. † It is that on which I have descanted in the 4th chapter of this book, and is to be found in Balusius's edition of the capitularies, tome 1. art. 11. page 9.

Agraria & pascuaria, vel decimas porcorum, ecclesia concedimus, ita ut actor aut decimator in rebus ecclesia nullus accedat. The capitulary of Charlemagne in
the year 800, Balusius's edition, page 336, explains
extremely well what is meant by that fort of tithe
from which the church is exempted by Clotarius; it
was the tithe of the hogs which were put into the
king's forests to fatten; and Charlemagne injoins his
judges to pay it, as well as other people, in order to
set an example: It is plain, that this was a right of
seigniory or occonomy.

be exempted from paying them. The fecond council * of Macon, which was held in 585, and ordains the payment of tithes, fays indeed that they were paid in ancient times; but it fays also that the custom of paying them was then abolished.

No one questions but that the clergy opened the Bible before Charlemagne's time, and preached the gifts and offerings of the Leviticus. But I say, that before that prince's reign, though the tithes might have been preached up, yet they were never esta-

blished.

I took notice that the regulations made under king Pepin had subjected those who were seised of church-lands in sief, to the payment of tithes, and to the repairing of the churches. It was a great point to oblige by a law, whose justice could not be disputed, the principal men of the nation to set the example.

Charlemagne did more; and we find by the capitulary † de villis, that he obliged his own demesnes to the payment of the tithes: This was still

a greater example.

But the common people are hardly capable of being induced by examples to give up their own interests. The synod of ‡ Francfort surnished them with a more cogent motive to pay the tithes. A capitulary was made in that synod, wherein it is said, that in the last # famine the ears of corn were found empty, having been devoured by devils, and that the voices of those infernal spirits had been

* Canone 5. ex tomo 1. conciliorum antiquorum Galliæ, opera Jacobi Sirmundi.

† Art. 6. Balusius's edition, page 332; it was given in 800.

Held under Charlemagne, in the year 794.

|| Experimento enim didicimus, in anno quo illa valida fames irrepsit, ebullire vacuas annonas a dæmonibus devoratas, et voces exprobrationis auditas, &c. Balusius's edition, page 267. art. 23.

heard, reproaching them with not having paid the tithes; in confequence of which it was ordained that all those who were seised of church-lands, should pay the tithes; and the next consequence was, that the obligation was extended to all.

Charlemagne's project did not fucceed at first; for it seemed too heavy a burthen *. The payment of the tithes among the Jews was connected with the plan of the soundation of their republic; but here the payment of tithes was a burthen quite independent of the other charges of the establishment of the monarchy. We find, by the regulations; added to the law of the Lombards, the difficulty there was in causing the tithes to be accepted by the civil laws; and how difficult it was to get them admitted by the ecclesiastical laws, we may easily judge from the different canons of the councils.

The people consented at length to pay the tithes, upon condition that they might have a power of redeeming them. This the constitution of Lewis le Debonnaire ‡, and that of the emperor Lotarius

his fon would not allow.

The laws of Charlemagne, in regard to the establishment of tithes, were a work of necessity; a work in which religion only, and no superstition, was concerned.

His famous division of the tithes into four parts,

* See amongst the rest the capitulary of Lewis le Debonnaire, in the year 829, Balusius's edition, page 663, against those who, to avoid paying tithes, neglected to cultivate the lands. &c. art. 5. Nonis quidem & decimis, unde & genetor noster & nos frequenter in diversis placitis admonitionem fecimus.

† Among others, that of Lotarius, book iii. tit. 3.

chap. 6.

† In the year 829. art 7. in Balusius, tome 1. page

In the law of the Lombards, book iii. tit. 3. § 8.

for the repairing of the churches, for the poor, for the bishop, and for the clergy, manifestly proves that he wanted to restore the church to that fixed and permanent state which she had lost.

His will ‡ shows that he was desirous of repairing the mischief done by his grandfather Charles Martel. He made three equal shares of his moveable goods; two of these he divided each into one-and-twenty parts, for the one-and-twenty metropolitan churches of his empire; each part was to be subdivided between the metropolitan and the suffragan bishops. The remaining third he divided into four parts; one he gave to his children and grandchildren, another was added to the two thirds already given, and the other two were bequeathed to charitable uses. It seems as if he looked upon the immense donation he was making to the church less as a religious act, than as a political distribution.

CHAP. XIII.

Of the elections of bishops and abbots.

As the churches were become poor, the kings refigned the right of * nominating to bishop-rics and other ecclesiastical benefices. The princes gave themselves less trouble about the ministers of the church; and the candidates were less solicitous in applying to their authority. Thus the church received a kind of compensation for the possessions she had lost.

† It is a kind of codicil produced by Eginhard, and different from the will itself, which we find in Goldastus and Balusius.

* See the capitulary of Charlemagne in the year 803, art. 2. Balusius's edition, page 379. and the edict of Lewis le Debonnaire, in the year 834, in Goldast. constit. Imperial. tome 1.

Hence if Lewis le Debonnaire * left the people of Rome in possession of the right of chusing their popes, it was owing to the general spirit that prevailed in his time: He behaved in respect to the see of Rome the same as to other bishoprics.

CHAP. XIV.

Of the fiefs of Charles Martel.

I Shall not pretend to determine whether Charles Martel, in giving the church-lands in fief, made a grant of them for life or in perpetuity. All I know is, that under Charlemagne +, and Lotarius I. ‡ there were possessions of this kind which descended to the next heirs, and were divided amongst them.

I find moreover that one part of them | was gi-

ven as allodia, and the other as fiefs.

I took notice that the proprietors of the allodia, were subject to the service all the same as the possessors of the fiefs. This, without doubt, was

* This is mentioned in the famous canon, Ego Ludovicus, which is visibly supposititious; it is in Balusius's edition, page 591. in 817.

+ As appears by his capitulary, in the year 801,

art. 17. in Balusius, tome 1. page 360.

‡ See his constitution inserted in the code of the

Lombards, book iii. tit. 1. § 44.

See the above constitution, and the capitulary of Charles the Bald, in the year 846, chap. 20. in villa Sparnaco, Balusius's edition, tome 2. page 31. and that of the year 853, chap. 3. and 5. in the synod of Soissons, Balusius's edition, tome 2. page 54, and that of the year 854, apud Attiniacum, chap. 10. Balusius's edition, tome 2. page 70. See also the first capitulary of Charlemagne, incerti anni, art. 49, and 56. Balusius's edition, tome 1. page 519.

partly.

partly the reason that Charles Martel made grants of allodial lands, as well as of fiels.

CHAP. XV.

The same subject continued.

WE must observe, that the siefs having been changed into church lands, and these again into siefs, they both borrowed something of one another's nature. Thus the church lands had the privileges of siefs, and these had the privileges of church lands: Such were the * honourable rights of the churches, established in those days.

CHAP. XVI.

Confusion of the royalty and mayoralty. The second race.

THE order of my subject has made me break through the order of time, so as to speak of Charlemagne before I had made mention of the samous epocha of the translation of the crown to the Carlovingians under king Pepin: A revolution, which, contrary to the nature of common events, is more remarked perhaps in our days than when it happened.

The kings had no authority; they had only an empty name. The title of king was hereditary, and that of mayor elective. Though the mayors in the latter times fet whom they pleased of the Merovingians on the throne, they had not yet taken a king of another race; and the ancient law

^{*} See the capitularies, book v. art. 44. and the edict of Pistes in the year 869, art. 8, and 9. where we find the honourable rights of the lords established in the same manner as they are at this very day.

which fixed the crown in a particular family, was not yet effaced out of the hearts of the Franks, The king's person was almost unknown in the monarchy; but the royalty was well known. Pepin, fon of Charles Martel, thought it would be proper to confound those two titles, a confusion which would leave it uncertain whether the new royalty was hereditary or not; and this was fufficient for him, who to the regal dignity had joined a great The mayor's authority was then blended with that of the king. In the mixture of these two authorities a kind of reconciliation was made; the mayor had been elective, and the king hereditary; the crown at the beginning of the fecond race was elective, because people chose; it was hereditary, because they always chose in the same family *.

Father le Cointe, in opposition to the authority of all ancient records †, denies ‡ that the pope authorised this great change; and one of his reasons is, that he would have committed an injustice. A fine thing to see an historian judge of what men have done, by what they ought to have done! At

this rate we should have no history at all.

Be that as it may, it is very certain, that, immediately after Duke Pepin's victory, the Merovingians ceased to be the reigning family. When his grandson Pepin was crowned king, it was only a

* See the will of Charlemagne, and the division which Lewis le Debonnaire made to his children in the assembly of the states held at Quiercy, produced by Goldast. Quem populus eligere velit, ut patri suo succedat in regni hereditate.

+ The anonymous chron. in the year 752, and

chronic. Centul. in the year 754.

† Fabella quæ post Pippini mortem excogitata est, æquitati ac sanctitati Zachariæ Papæ plurimum adversatur.—Ecclesiastic annals of the French, tome 2. page 319.

ceremony the more, and a phantom the less; he acquired nothing thereby but the noyal ornaments, there was no change made in the nation.

This I have faid, in order to fix the moment of the revolution, to the end that we may not be miftaken in looking upon that as a revolution which

was only a confequence of it.

When Hugh Capet was crowned king at the beginning of the third race, there was a much greater change, because the kingdom passed from a state of anarchy to some kind of a government; but when Pepin ascended the throne, there was only a transition from one government to another of the same nature.

When Pepin was crowned king, there was only a change of name; but when Hugh Capet was crowned, there was a change in the nature of the thing, because by uniting a great fiel to the crown the anarchy ceased.

When Pepin was crowned, the title of king was united to the highest office; when Hugh Caper was

crowned it was united to the greatest fief.

CHAP. XVII.

A particular thing in the election of the kings of the fecond race.

WE find by the formulary * of Pepin's confecration, that Charles and Carloman were also anointed and bleffed; and that the French pobility bound themselves, on pain of interdiction and excommunication, never to chuse a prince † of another family.

* Vol. 5. of the historians of France, by the Bene-

dictines, page 9.

† Ut nunquam de alterius lumbis regem in ævo præsumant eligere, sed ex ipsorum. Vol. 5. of the hissorians of France, page 10.

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It appears by the wills of Charlemagne and Lewis le Debonnaire, that the Franks made a choice among the king's children; which agrees with the above-mentioned clause. And when the empire was transferred from Charlemagne's family, the election. which before had been conditional, became simple and absolute; so that the ancient constitution was altered.

Pepin perceiving himself near his end, assembled * the lords both temporal and spiritual at St. Denis, and divided his kingdom between his two fons, Charles and Carloman. We have not the acts of this affembly; but we find what was there transacted, in the author of the ancient historical collection, published by Canisius, and in the writer of the annals of Metz, according to the observation of Balusus. Here I meet with two things in some measure contradictory; that he made this division with the confent of the nobility, and afterwards that he made it by his paternal authority. proves what I faid, that the people's right in the fecond race was to chuse in the same family; it was, properly fpeaking, rather a right of exclusion, than that of election.

This kind of elective right is confirmed by the records of the second race. Such is this capitulary of the division of the empire made by Charlemagne among his three children, in which, after fettling their division, he says ||, "That if one of the three brothers happens to have a son, such " as the people shall be willing to chuse as a fit person to succeed to his father's kingdom, his " uncles shall consent to it." " " " "

* In the year 768.

+ Tome 2. lectionis antiqua.

‡ Edition of the capitularies, tome 1. page 188. In the 1st capitulary of the year 806, Balusius's edition, page 439. art. 5.

This fame regulation is to be met with in the division * which Lewis le Debonnaire made among his three children, Pepin, Lewis, and Charles, in the year 837, at the affembly of Aix-la-Chapelle; and likewise in another + division, made twenty years before, by the same emperour, between Lotarius, Pepin, and Lewis. We may likewise see the oath which Lewis the Stammerer took at Compeigne, at his coronation. I Lewis, by the divine mercy, and the people's election t, appointed king, do promise . . . What I say is confirmed by the acts of the council of Valence | held in the year 890, for the election of Lewis fon of Boson to the kingdom of Arles. Lewis was there elected; and the principal reason they give for chusing him is, that he was of the Imperial family &, that Charles the Fat had conferred upon him the dignity of king, and that the emperour Arnold had invested him by the sceptre, and by the ministry of his ambasfadours. The kingdom of Arles, like the other dismembered or dependent kingdoms of Charlemagne, was elective and hereditary.

* In Goldast. Imperial. Constitut. tome 2. page 19. † Balusus's edition, page 574. art. 14. Si vero aliquis illorum decedens legitimos filios reliquerit, non inter eos potestas ipsa dividatur, sed potius populus pariter conveniens, unum ex iis quem dominus voluerit eligat; & hunc senior frater in loco fratris et filii suscipiat.

‡ Capitulary of the year 877, Balusius's edition,

page 272.

In father Labbe's councils, tome 9. col. 424. and

See his 3d capitulary of the year \$12, page 486.

in Dumont's corp. diplomat, tome 1. art. 36.

By the mother's fide.

the sear Real parts on the arm of the and others.

CHAP. XVIII.

CHARLEMAGNE.

"HARLEMAGNE's attention was to restrain the power of the nobility within proper bounds, and to hinder them from oppressing the freemen and the clergy. He balanced the feveral orders of the state, and remained perfect master of them all. The whole was united by the strength of his genius. He led the nobility continually from one expedition to another; giving them no time to form defigns of their own, but employing them entirely in following his. The empire was supported by the greatness of its chief: The prince was great, but the man was greater. The kings his children were his first subjects, the instruments of his power, and patterns of obedience. He made admirable regulations; and, what was still more admirable, he took care to fee them executed. His genius diffused itself through every part of the empire. We find in this prince's laws a spirit of forecast and sagacity that comprifes every thing, and a certain force that makes every thing give way. All pretexts * for evading the performance of duties are removed, neglects are corrected, abuses reformed, or prevented. He knew how to punish, but he understood much better how to pardon. He was great in his defigns, and fimple in the execution of them. No prince was ever possessed in a higher degree of the art of performing the greatest things with ease, and the most difficult with expedition. He was continually traverling the feveral parts of his vast empire, and made them feel the weight of

his

^{*} See his 3d capitulary of the year 811, page 486. art. 1, 2, 3, 4, 5, 6, 7, and 8. and the 1st capitulary of the year 812, page 490. art. 1. and the capitulary of the year 812, page 494. art. 9, 11, and others.

his hand wherever it fell. New difficulties forung up on every fide, and on every fide he removed them. Never prince had more refolution in facing dangers; never prince knew better how to shun them. He mocked all manner of perils, and particularly those to which great conquerors are generally subject, namely conspiracies. This surprifing prince was extremely moderate, of a very mild character, and of a plain fimple behaviour. He loved to converse freely with the lords of his court. He gave way perhaps too much to his passion for the fair fex; a failing, however, which in a prince who always governed by himself, and who spent his life in a continual fuccession of toils, may merit fome indulgence. He was wonderfully exact in his expences; administering his demesnes with prudence, attention, and oeconomy. A father * might learn from his laws how to govern his family; and we find in his capitularies the pure and facred fource from whence he derived his riches. I shall add only one word more: He gave orders that + the eggs of the barons of his demesnes, and the superfluous herbs of his gardens, fhould be fold; a most wonderful occonomy in a prince, who had distributed among his people all the riches of the Lombards, and the immense treasures of those Huns who had plundered the universe.

CHAP. XIX.

The same subject continued.

THIS great prince was afraid left those whom he intrusted in different parts with the command,

* See the capitulary de villis in the year 800, his 2d capitulary of the year 813, art. 6, and 19. and the 5th book of the capitularies, art. 303.

† Capitul. de villis, art. 39. See this whole capitulary, which is a masterpiece of prudence, good ad-

ministration, and oeconomy.

should be inclined to revolt; and thought he should find more docility among the clergy. For this reason he erected a great number of bishoprics in Germany +, and endowed them with very large fiefs. It appears by some charters, that the clauses containing the prerogatives of those fiefs, were not different from those which were commonly inferted in those grants ‡; though at present we find the principal ecclefiaftics of Germany invested with a fovereign power. Be that as it may, these were fome of the contrivances he used against the Saxons. That which he could not expect from the indolence and supineness of a vasfal, he thought he might promise himself from the sedulous attention of a bishop. Besides, a vassal of that kind, far from making use of the conquered people against him, would rather stand in need of his assistance to support himself against his people.

CHAP. XX.

The Successours of Charlemagne.

WHEN Augustus Cæsar was in Egypt, he ordered Alexander's tomb to be opened; and upon their asking him whether he was will willing they should open the tombs of the Ptolemies, he answered that he wanted to see the king, and not the dead. Thus, in the history of the second race, we are continually looking for Pepin and Charle-

† See among others the foundation of the archbifhopric of Bremen in the capitulary of the year 789,

Balusius's edition, page 245.

† For instance, the prohibition to the king's judges against entering upon the territory to demand the freda, and other duties. I have said a good deal concerning this in the preceding book.

magne; we want to fee the kings, and not the dead.

A prince who was the sport of his passions, and a dupe even to his virtues; a prince who never understood rightly either his own strength or weakness; a prince who was incapable of making himself either feared or beloved; a prince, in fine, who with few vices in his heart, had all manner of defects in his understanding, took the reigns of the empire into his hand which had been held by

Charlemagne.

Lewis le Debonnaire mixing all the indulgence of an old husband, with all the weakness of an old king, flung his family into diforder, which was followed with the downfal of the monarchy. He was continually altering the divisions he had made among his children. And yet these divisions had been confirmed each in their turn by his own oath, and by those of his children and the nobility. This was as if he wanted to try the fidelity of his fubjects; it was endeavouring by confusion, scruples, and equivocation, to puzzle their obedience; it was confounding the different rights of those princes, and rendering their titles dubious, especially at a time when there were but few strong holds, and when the principal bulwark of authority was the fealty fworn and accepted.

The emperour's children, in order to preserve their divisions, courted the clergy, and granted them privileges till then unheard. These privileges were specious; the clergy were induced to warrant a thing which those princes would have been glad they had authorised. Agobard * represents to Lewis le Debonnaire, his having sent Lotarius to Rome, in order to have him declared emperour; and that he had made a division of his dominions among his children, after having consulted heaven

^{*} See his letters.

by three days fasting and praying. What defence could a superstitious prince make against the attack of superstition! It is easy to perceive what a shock the supreme authority must have twice received from the imprisonment of this prince, and from his public penance; they wanted to degrade the king, and they degraded the regal dignity.

CHAP. XXI.

The same subject continued.

THE strength which the nation had derived from Charlemagne, lasted well enough under Lewis le Debonnaire, to enable the state to support its grandeur, and to command respect from strangers. This prince's understanding was weak, but the nation was warlike. The royal authority declined at home, though there seemed to be no diminution of power abroad.

Charlemagne, his father, and his grandfather, were successive rulers of the monarchy. The first flattered the avarice of the soldiers; the other two that of the clergy; and the children of Lewis le

Debonnaire, excited the ambition of both.

In the French constitution, the whole power of the state was lodged in the hands of the king, the nobility, and clergy. Charles Martel, Pepin, and Charlemagne, joined sometimes their interest with one of those parties to check the other, and generally with both: But the children of Lewis le Debonnaire disjoined both those bodies from the king, by which means the royal authority was too much debilitated.

CHAP. XXII.

The same subject continued.

THE clergy had reason to repent the protection they had given to Lewis le Debonnaire's children dren. This prince, as I have already observed, had never given * any of the church-lands by precepts to the laity; but it was not long before Lotarius in Italy, and Pepin in Aquitaine, quitted Charlemagne's plan, and resumed that of Charles Martel. The clergy had recourse to the emperour against his children, but they themselves had weakened the authority they sued. In Aquitaine some condescention was shewn, but none in Italy.

The civil wars with which the life of Lewis le Debonnaire had been embroiled, were the feed of those which followed his death. The three brothers, Lotarius, Lewis, and Charles, endeavoured each to bring over the nobility to their party. To those therefore who were willing to follow them, they granted the church-lands by precepts; so that

We find in the capitularies †, that those princes were obliged to yield to the importunity of so many demands, and that what they would not often have freely granted, was extorted from them: We fee that the clergy thought themselves more oppressed by the nobility than by the kings. It appears also, that Charles the Bald ‡ became the greatest

* See what the bishops say in the synod of the year 845, apud Teudonis villam, art. 4.

† See the fynod in the year 845, apud Teudonis villam, art. 3, and 4. which gives a very exact description of things; as also that of the same year, held at the palace of Vernes, art. 12. and the synod of Beauvais also in the same year, art. 3, 4, and 6 and the capitulary in villa Sparnaco, in the year 846, art. 20. and the letter which the bishops assembled at Rheims wrote, in 858, to Lewis king of Germany, art. 8.

† See the capitulary in villa Sparnaco, in the year 846. The nobility had fet the king against the bishops, infomuch that he expelled them from the affembly; some canons of the synods were picked out,

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greatest enemy of the patrimony of the clergy, whether he was most incensed against them for having degraded his father on their account, or whether he was the most timorous. Be this as it may, we meet with * continual quarrels in the capitularies between the clergy who demanded their lands, and the nobility who refused, evaded, or deferred to restore them; and the kings between both.

The fituation of things at that time is a spectacle really deserving of pity. While Lewis le Debonnaire made immense donations out of his demesses to the church, his children distributed the possessions of the clergy among the laity. The same hand which sounded new abbies, often pulled down the old ones. The clergy had no fixed state; one moment they were stripped, another they received satisfaction; but the crown was continually lossing.

and they were told that these were the only ones which should be observed; nothing was granted them but what was impossible to be refused. See art. 20, 21, 22. See also the letter which the bishops affembled at Rheims wrote, in the year 858, to Lewis king of Germany, and the edict of Pistes, in the year 864,

art. 5.

* See this very capitulary in the year 846, in villa Sparnaco. See also the capitulary of the assembly held apud Marsnam, in the year 847, art. 4. wherein the clergy reduced themselves to demand only the restitution of what they had been possessed of under Lewis le Debonnaire. See also the capitulary of the year 851. apud Marsnam, art. 6, and 7. which confirms the nobility and clergy in their several possessions; and that apud Bonoilum, in the year 856, which is a remonstrance of the bishops to the king, because the evils, after so many laws, had not been remedied; and in fine, the letter which the bishops assembled at Rheims wrote, in the year 858, to Lewis king of Germany, art. 8.

Towards

Towards the close of the reign of Charles the Bald, and from that time forward, there was an end of the disputes of the clergy and laity, concerning the restitution of lands. The bishops indeed breathed out still a few sighs in their remonstrances to Charles the Bald, which we find in the capitulary of the year 856, and in the letter * they wrote to Lewis king of Germany, in the year 858: But they proposed things and challenged promises so often eluded, that we plainly see they had no longer any hopes of obtaining their desire.

All that could be expected then, was † to repair in general the injuries done both to church and state. The kings engaged not to deprive their vaffals of their freemen, and not to give away the church-lands any more by precepts ‡; fo that the interests of the clergy and nobility seemed then to

be united.

The dreadful depredations of the Normans, as I have already observed, contributed greatly to put

an end to those quarrels.

The authority of our kings diminishing every day, both for the reasons already given, and those which I shall give hereaster, they thought they had no better resource left, than to put themselves in the hands of the clergy. But the clergy had weakened the power of the kings, and the kings had weakened the influence of the clergy.

In vain did Charles the Bald and his fucceffours call in the church to support the state, and to prevent its fall; in vain did they avail themselves of

^{*} Art. 8.

^{+.} See the capitulary of the year 853, art. 6, and 7.

[†] Charles the Bald, in the fynod of Soissons, fays that he had promised the bithops not to issue out any more precepts relating to church lands. Capitularies of the year 853, art. 11. Balusius's edition, tome 2. page 56.

the * respect the people had for that body, to maintain that which they should have also for their prince; in vain did they endeavour † to give an authority to their laws by that of the canons; in vain did they join the ecclesiastic ‡ with the civil punishments; in vain to counterbalance the authority of the count || did they give to each bishop the title of their commissary in the several provinces: It was impossible for the clergy to repair the mischief they had done; and a terrible missfortune, of which I shall speak anon, tumbled the crown to the ground.

CHAP. XXIII.

That the freemen were rendered capable of holding fiefs.

I Said that the freemen were led against the enemy by their count, and the vassals by their lord.

* See the capitulary of Charles the Bald, apud Saponarias, in the year 859, art. 3. "Venilon, whom
"I made archbishop of Sens, has consecrated me;
"and I ought not to be expelled the kingdom by any
"body," faltem sine audientia & judicio episcoporum,
quorum ministerio in regem sum consecratus, & qui throni Dei sunt dicti, in quibus Deus sedet, & per quos sua
decernit judicia, quorum paternis correctionibus & castigatoriis judiciis me subdere sui paratus, & in prasenti
subditus.

† See the capitulary of Charles the Bald, de Carisiaco, in the year 857, Balusius's edition, tome 2.

page 88. art. 1, 2, 3, 4, and 7.

‡ See the fynod of Pistes, in the year 862, art. 4. and the capitulary of Carloman and of Lewis II. apud Vernis palatium, in the year 883, art. 4, and 5.

|| Capitulary of the year 876, under Charles the Bald, in fynodo Pontigonensi, Balusius's edition, art.

This was the reason that the several orders of the state balanced each other; and though the king's vassals had other vassals under them, yet they might be overawed by the count, who was at the

head of all the freemen of the monarchy.

The freemen * were not allowed at first to vow fealty for a fief; but in process of time this was permitted: And I find that this change was made during the time that elapsed from the reign of Gontram to that of Charlemagne, This I prove by the comparison that may be drawn between the treaty of Andely +, figned by Gontram, Childebert, and Queen Brunechild, and the ‡ division made by Charlemagne among his children, as well as a like division made by Lewis le Debonnaire. These three acts contain pretty near the same regulations, with regard to the vaffals: And as they regulate the very fame points, under almost the same circumstances, the spirit, as well as the letter, of those three treaties, are very near the same in this respect.

But as to what concerns the freemen, there is a capital difference. The treaty of Andely does not fay that they might vow fealty for a fief; whereas we find, in the divisions of Charlemagne and Lewis le Debonnaire, express clauses to empower them to vow fealty. This shews that a new usage had been introduced after the treaty of Andely, whereby the freemen were become capable of

this great privilege.

This must have happened when Charles Martel, after distributing the church-lands to his foldiers,

which they are quoted.

^{*} See what has been faid already, book xxx. last chapter towards the end.

[†] In the year 587, in Gregory of Tours, book ix. ‡ See the following chapter, where I shall speak more diffusively of those divisions; and the notes in

partly in fief, and partly as allodia, made a kind of revolution in the feudal laws. It is very probable that the nobility who were feifed already of fiefs, found a greater advantage in receiving the new grants as allodia; and that the freemen thought themselves happy in accepting them as fiefs.

CHAP. XXIV.

THE PRINCIPAL CAUSE OF THE HUMILIATION OF THE SECOND RACE.

Changes in the allodia.

CHARLEMAGNE, in the division * mentioned in the preceding chapter, ordained, that after his death the vassals belonging to each king should be permitted to receive benefices in their own prince's dominions, and not in those † of another; whereas they ‡ might keep their allodial estates in any of their dominions. But he adds #, that every freeman might after the death of his lord vow sealty in any of the three kingdoms to whom he pleased, as well as he that never had had a lord. We find the same regulations in the division which Lewis le Debonnaire made among his children in the year 817.

* In the year 806, between Charles, Pepin, and Lewis; it is quoted by Goldast, and by Balusius, tome 1. page 439.

† Art. 9. page 443. which is agreeable to the trea-

ty of Andeley in Gregory of Tours, book ix.

‡ Art. 10. and there is no mention made of this in

the treaty of Andely.

In Balusius, tome 1. page 574. Licentiam habeat unusquisque liber homo qui seniorem non habuerit, cuicumque ex his tribus fratribus voluerit, se commendandi, art. 9. See also the division made by the same emperour, in the year 837, art. 6. Balusius's edition, page 686.

But

But though the freemen had vowed fealty for a fief, yet the count's militia was not thereby weakened; the freeman was still obliged to contribute for his alledium, and to get people ready for the fervice belonging to it, at the proportion of one man to four manors; or else to procure a man that should serve the fief in his stead. And when some abuses had been introduced upon this head, they were redressed, as appears by the constitutions of Charlemagne, and by that † of Pepin king of Italy, which explain each other.

The remark made by historians, that the battle of Fontenay was the ruin of the monarchy, is very true; but I beg leave to cast an eye on the unhap-

py confequences of that day.

Some time after that battle, the three brothers, Lotarius, Lewis, and Charles, made a treaty ‡, wherein I find fome clauses which must have altered the whole political system of the French government.

In the declaration || which Charles made to the people of that part of the treaty relating to them, he fays, that § every freeman might chuse whom

* In the year 811, Balusius's edition, tome 1. page 486. art. 7. and 8. and that of the year 812, ibid. page 490. art. 1. Ut omnis liber homo qui quatuor manfos vestitos de proprio suo, sive de alicujus beneficio, habit, ipse se praparet, & ipse in hostem pergat, sive cum seniore suo, &c. See also the capitulary of the year 807, Balusius's edition, tome 1. page 458.

+ In the year 793, inferted in the law of the Lom-

bards, book iii. tit. 9. chap. 9.

‡ In the year 847, quoted by Aubert Lemire, and Balusius, tome 2. page 42. Conventus apud Marsnam.

Adnunciatio.

§ Ut unusquisque liber homo in nostro regno seniorem quem voluerit in nobis, et in nostris fidelibus, accipiat. Art. 2. of the declaration of Charles. he pleased for his lord, whether the king or any of the nobility. Before this treaty the freeman might vow fealty for a fief; but his allodium still continued under the immediate power of the king, that is, under the count's jurisdiction; and he depended on the lord to whom he had vowed fealty, only on account of the fief which he had obtained. After that treaty every freeman had a right to subject his allodium to the king, or to any other lord, as he thought proper. The question is not concerning those who put themselves under the protection of another for a fief, but about those who changed their allodium into a fief, and withdrew themselves, as it were, from the civil jurisdiction, to enter under the feudal power of the king, or of the lord whom they thought fit to chuse.

Thus it was that those who formerly were only under the king's power, as freemen under the count, became insensibly vassals one of another, since every freeman might chuse whom he pleased for his lord, the king, or any of the nobility.

2. If a man changed an estate, which he posfessed in perpetuity, into a sief, this new sief could no longer be only for life. Hence we see, a short time after, a * general law for giving the siefs to the children of the present possessor: It was made by Charles the Bald, one of the three contracting princes.

What has been faid concerning the liberty every freeman had in the monarchy, after the treaty of the three brothers, of chusing whom he pleased for his lord, the king, or any of the nobility, is con-

firmed by the acts subsequent to that time.

^{*} Capitulary of the year 877, tit. 53. art. 9, & 10. apud Carifiacum, Similiter & de nostris vasfalis faciendum est, &c. This capitulary relates to another of the same year, and of the same place, art. 3.

In the reign * of Charlemagne, when a vaffal had received a thing of a lord, were it worth only a fol, he could not afterwards quit him. But, under Charles the Bald, the vaffals † might follow their interests or their caprice with impunity; and this prince explains himself so strongly on this subject, that he seems rather to encourage them to enjoy this liberty, than to restrain it. In Charlemagne's time, benefices were rather personal than real; afterwards they became rather real than personal.

CHAP. XXV.

Changes in the fiefs.

THE same changes happened in the siefs, as in the allodia. We find by the capitulary ‡ of Compeigne, under King Pepin, that those who had received a benefice from the king, gave a part of this benefice to different bondmen; but these parts were not distinct from the whole. The king revoked them when he revoked the whole; and, at the death of the king's vassal, the rear-vassal lost

* Capitulary of Aix-la-Chapelle, in the year 813, art. 16. Quod nullus seniorem suum dimittat, postquam ab eo acceperit valente solidum unum; and the capitulary

of Pepin, in the year 783, art. 5.

+ See the capitulary de Carisiaco, in the year 856, art. 10, and 13. Balusius's edition, tome 2. page 83. in which the king, together with the lords spiritual and temporal, agreed to this: Et si aliquis de vobis sit, cui suus senioratus non placet, & illi simulat ad alium seniorem melius quam ad illum acaptare possit, veniat ad illum, et ipse tranquille et pacifico animo donet illi comeatum—et quod Deus illi cupierit ad alium seniorem acaptare potuerit, pacifice habeat.

In the year 757, art. 6. Balusius's edition page,

181.

also his rear-fief; and a new beneficiary succeeded, who likewise established new rear-vassals. Thus it was the person, and not the rear-fief, that depended on the fief: On the one hand, the rear-vassal returned to the king, because he was not tied for ever to the vassal; and the rear-fief returned also to the king, because it was the fief itself, and not a dependance of it,

Such was the rear-vassalage, while the siefs were during pleasure; and such was it also, while they were for life. This was altered when the siefs descended to the next heirs, and the rear-siefs the same. That which was held before immediately of the king, was held now mediately; and the regal power was thrown back, as it were, one degree;

fometimes two, and oftentimes more.

We find in the books * of the fiefs, that though the king's vaffals might give away in fief, that is, in rear-fief to the king, yet these rear-vaffals or petty vavasors could not give also in fief; so that whatever they had given, they might always resume. Besides, a grant of that kind did not descend to the children like the siefs, because it was not supposed to have been made according to the law of the siefs.

If we compare the fituation in which the rearvaffalage was at the time when the two Milanese senators wrote that book, to what it was under King Pepin, we shall find that the rear-siefs preserved † their primitive nature longer than the siefs.

But when those senators wrote, such general exceptions had been made to this rule, as had almost abolished it. For if a person ‡, who had received a fief of a rear-vassal, happened to follow him upon any expedition to Rome, he was intitled to all

^{*} Book i. chap. 1.

⁺ At least, in Italy and Germany.

[†] Book i. of fiefs, chap. i.

the privileges of a vassal. In like manner, if he had given money to the rear-vassal to obtain the fief, the latter could not take it from him, nor hinder him from transmitting it to his son, till he returned him his money. In fine, this rule * was no longer observed in the senate of Milan.

CHAP. XXVI.

Another change which happened in the fiefs.

IN Charlemagne's time † they were obliged, under great penalties, to repair to the general meeting in case of any war whatsoever; they admitted of no excuses, and if the count exempted any one, he was liable himself to be punished. But the treaty of the three brothers ‡ made a restriction || upon this head, which rescued the nobility, as it were, out of the king's hands; they were no longer obliged to serve in time of war, but when the war was defensive. In others, they were at liberty to sollow their lord, or to mind their business.

The death of an hundred thousand French, at the battle of Fontenay, made the few remains of the nobility imagine, that, by the private quarrels of their kings, about their respective shares, they should be utterly exterminated, and that their ambition and jealousy would cause the effusion of

* Book i. of fiefs, chap. 1.

† Capitulary of the year 802, art. 7. page 365.

‡ Apud Marsnam, in the year 847. Balusius's edition, page 42.

Volumus ut cujuscumque nostrum homo, in cujuscumque regno sit, cum seniore suo in hostem, vel aliis suis utilitatibus, pergat, nisi talis regni invasio quam Lamtuveri dicunt, quod absit accederit, ut omnis populus illius regni ad eam repellendam communiter pergat. Art. 5. ibid. page 44.

3 N 2 what

what little blood was left. A law was therefore passed, that the nobility should not be obliged to serve their princes in the wars, unless it was to defend the state against a foreign invasion. This law * obtained for several ages.

CHAP. XXVII.

Changes which happened in the great offices, and in the fiefs.

EVERY thing feemed to be infected with a partieular vice, and to be corrupted at one and the fame time. I took notice, that in the beginning feveral fiefs had been alienated in perpetuity; but those were particular cases, and the fiefs in general preserved their nature; so that if the crown lost some fiefs, she had substituted others in their stead. I likewise took notice, that the crown had never alienated the great offices in perpetuity †.

But Charles the Bald made a general regulation, which equally affected the great offices and the fiefs. He ordained in his capitularies, that the ‡ counties should be given to the count's children, and that this regulation should also take place in respect to

the fiefs.

* See the law of Guy king of the Romans among those which were added to the Salic law, and to that

of the Lombards, tit. 6. § 2. in Echard.

† Some authors pretend, that the county of Toulouse had been given away by Charles Martel, and passed by inheritance down to Raymond the last count; but, if this be true, it was owing to some circumstances, which might have been an inducement to chuse the counts of Toulouse from among the children of the last possessor

† See his capitulary of the year 877, tit. 53. art. 9, and 10. apud Carifiacum; this capitulary is relative to

another of the same yearau d place, art. 3.

We

We shall see presently that this regulation received a much greater extent, insomuch that the great offices and siefs went even to more distant relations. From thence it followed, that the greatest part of the lords, who held immediately of the crown, held now only mediately. Those counts who formerly administered justice in the king's placita, and who led the freemen against the enemy, found themselves situated between the king and his freemen; and the king's power was removed further off another degree.

Again, it appears by the capitularies *, that the counts had benefices annexed to their count, and vaffals under them. When the counties became hereditary, the count's vaffals were no longer the immediate vaffals of the king; and the benefices annexed to the counties were no longer the king's benefices: the counts grew powerful, because the vaffals they had already under them enabled them to

procure others.

In order to be convinced how much the monarchy was thereby weakened towards the end of the fecond race, we have only to turn our eyes to what happened at the beginning of the third, when the multiplicity of rear-fiefs flung the great vaffals into despair.

It was a custom † of the kingdom, that when the elder brothers had given shares to their younger brothers, the latter paid homage to the elder; so that the reigning lord held them only as a rear-fief. Philip Augustus, the duke of Burgundy, the counts

† As appears from Otho of Frisingen, of the actions

of Frederic, book 2. c. 29.

^{*} The 3d capitulary of the year 812, art. 7. and that of the year 815, art. 6. on the Spaniards. The collection of the capitularies, book 5. art. 228, and capitulary of the year 869, art. 2. and that of the year 877, art 13. Balusius's edition.

of Nevers, Boulogne, St. Paul, Dampierre, and other lords, declared ‡ that henceforward, whether the fief was divided by fuccession, or otherwise, the whole should be held always of the same lord, without any intermediation. This ordinance was not generally followed; for, as I have elsewhere observed, it was impossible to make general ordinances at that time; but many of our customs were regulated by them.

CHAP. XXVIII.

Of the nature of the fiefs after the reign of Charles the Bald.

WE have observed, that Charles the Bald ordained, that when the possession of a great office or of a fief left a son at his death, the office or
fief should devolve to him. It would be a difficult
matter to trace the progress of the abuses which
from thence resulted, and of the extension given to
that law in each country. I find in the books * of
the fiefs, that, towards the beginning of the reign
of the emperor Conrad II. the fiefs situated in his
dominions did not descend to the grandchildren:
they descended only to one of the last possessiour's
children +, who had been chosen by the lord: thus
the siefs were given by a kind of election, which the
lord made among the children.

We have explained, in the feventeenth chapter of this book, in what manner the crown was, in some respects, elective, and in others hereditary, under the second race. It was hereditary, because the

[‡] See the ordinance of Philip Augustus in the year 1209, in the new collection.

^{*} Book 1. tit. 1.

[†] Sic progressum est, ut ad filios deveniret in quem dominus hoc vellet beneficium confirmare. Ibid.

kings were always taken from that family, and because the children succeeded; it was elective, by reason the people chose from amongst the children. As things of a similar nature move generally alike, and one political law is constantly relative to another, the same spirit was followed; in the succession of siefs, as had been followed in the succession to the crown. Thus the siefs were transmitted to the children by the right of succession, as well as of election; and each sief was become both elective and hereditary, like the crown.

This right of election in the person of the lord, was not subsisting | at the time of the authors § of the books of fiels, that is, in the reign of the em-

peror Frederic I.

CHAP. XXIX.

The same subject continued.

IT is mentioned in the books of the fiefs, that when * the emperor Conrad fet out for Rome, the vaffal in his fervice prefented a petition to him, that he would please to make a law, that the fiefs which descended to the children should descend also to the grandchildren; and that he whose brother died without legitimate heirs, might succeed to the fief which had belonged to their common father: This was granted.

‡ At least, in Italy and Germany.

|| Quod hodie ita stabilitum est, ut ad omnes æqualiter veniat. Book 1. f the siefs, tit. 1.

§ Gerardus Niger and Aubertus de Orto.

* Cum vero Conradus Romam proficifceretur, petitum est a sidelibus qui in ejus erant servitio. ut, lege ab eo promulgata, hoc etiam ad nepotes ex silio producere dignaretur; & ut frater fratri sine legitimo herede defuncto, in benesicio quod eorum patris suit, succedat. Book 1. of siefs, tit. 1. In the same place it is said, (and we are to remember, that those writers + lived at the time of the emperor Frederic I.), that the ancient civilians ‡ had always been of opinion, that the succession of siefs in a collateral line did not extend further than to cousin-germans by the father's side, though of late it was carried as far as the seventh degree, as by the new code they had extended it in a direct line in infinitum. It is thus that Conrad's law was

infenfibly extended.

All these things supposed, the bare reading of the history of France is sufficient to show, that the perpetuity of siefs was established earlier in France than in Germany. Towards the commencement of the reign of the emperor Conrad II. in 1024, things were upon the same footing still in Germany, as they had been in France under the reign of Charles the Bald, who died in 877. But such were the changes made in France after the reign of Charles the Bald, that Charles the Simple found himself unable to dispute with a foreign house his incontestable rights to the empire; and, in sine, that, in Hugh Capet's time, the reigning family, stripped of all its demesnes, was no longer able to maintain the crown.

The weak understanding of Charles the Bald produced an equal weakness in the French monarchy. But as Lewis king of Germany, his brother, and some of his successours, were men of better parts, their government preserved its vigour

much longer.

+ Cujas has proved it extremely well.

‡ Sciendum est, quod beneficium advenientes ex latere ultra fratres patrueles non progreditur successione ab antiquis sapientibus constitutum, licet moderno tempore usque ad septimum geniculum sit usurpatum, quod in masculis descendentibus novo jure in infinitum extenditur. Ibid.

But, what do I say? perhaps the slegmatic temper, and, if I dare use the expression, the immutability of spirit peculiar to the German nation, made a longer stand than that of the French nation, against this disposition of things, which perpetuated the siefs, by a natural tendency, in families.

Besides, the kingdom of Germany was not laid waste, and annihilated, as it were, like that of France, by that particular kind of war with which it had been harassed by the Normans and Saracens. There were less riches in Germany, fewer cities to plunder, less coasts to scour, more marshes to get over, more forests to penetrate. The princes who did not see every instant their dominions ready to fall to pieces, had less need of their vassals, and consequently had less dependence on them. And in all probability, if the emperors of Germany had not been obliged to be crowned at Rome, and to make continual expeditions into Italy, the siefs would have preserved their primitive nature much longer in that country.

CHAP. XXX.

In what manner the empire was transferred from the family of Charlemagne.

THE empire, which, in prejudice to the branch of Charles the Bald, had been already given to the * bastard line of Lewis king of Germany, was transferred to a foreign house by the election of Conrad duke of Franconia, in 912. The reigning branch in France, which was hardly able to dispute a few villages, was much less in a situation to dispute the empire. We have an agreement

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which passed between Charles the Simple and the emperor Henry I. who had succeeded to Conrad. It is called the compact of Bonn *, These two princes met in a vessel, which had been placed in the middle of the Rhine, and swore eternal friendship. They used on this occasion an excellent middle term. Charles took the title of king of West France, and Henry that of King of East France. Charles contracted with the king of Germany, and not with the emperor.

CHAP. XXXI.

In what manner the crown of France was transerred to the house of Hugh Capet.

THE inheritance of the fiefs, and the general establishment of rear-fiefs, extinguished the political, and formed a feudal government. Instead of that prodigious multitude of vaffals who were formerly under the king, there were now a few only, on whom the other's depended. The kings had scarce any longer a direct authority; a power which was to pass through so many, and through fuch great powers, either flopt or was lost before it reached its term. Those great vasfals would no longer obey; and they even made use of their rearvaffals to withdraw their obedience. The kings deprived of their demesses, and reduced to the cities of Rheims and Laon, were left exposed to their mercy; the tree stretched out its branches too far, and the head was withered. The kingdom found itself without a demesne, as the empire is at pre-The crown was therefore given to one of the most potent vaffals.

The Normans ravaged the kingdom; they came in a kind of boats or small vessels, entered the mouths of rivers, and laid the country waste on

^{*} In the year 926, quoted by Aubert le Mire, cod. donationum piarum, chap. 27. btoh

both fides. The cities of Orleans * and Paris put a ftop to those plunderers, so that they could not advance further, either on the Seine, or on the Loire. Hugh Capet, who was master of those cities, held in his hands the two keys of the unhappy remains of the kingdom; the crown was conferred upon him as the only person able to defend it. It is thus the empire was afterwards given to a family whose dominions form so strong a barrier against the Turks.

The empire went from Charlemagne's family, at a time when the inheritance of fiefs was established only as a mere condescendence. It even appears, that it obtained much later among the Germans than among the French; which was the reason that the empire, considered as a sief, was elective. On the contrary, when the crown of France went from the family of Charlemagne, the siefs were really hereditary in this kingdom; and the crown, as a great sief, was also hereditary.

But it is very wrong to refer to the very moment of this revolution, all the changes which had already happened, or happened afterwards. The whole was reduced to two events; the reigning family changed, and the crown was united to a great

fief.

CHAP. XXXII.

Some consequences of the perpetuity of fiels.

FRom the perpetuity of the fiefs it followed, that the right of feniority, or peimogeniture, was established among the French. This right was

* See the capitulary of Charles the Bald, in the year 877. apud Carifiacum, on the importance of Paris, St. Denis, and the castles on the Loire in those days.

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quite unknown under the first race †; the crown was divided among the brothers, the allodia were divided in the same manner; and as the fiess, whether precarious or for life, were not an object of succession, neither could they be of division.

Under the fecond race, the title of emperor which Lewis le Debonnaire enjoyed, and with which he honoured his eldest fon Lotarius, made him think of giving this prince a kind of superiority over his younger brothers. The two kings t were obliged to wait upon the emperor every year, to carry him prefents, and to receive much greater from him; they were to confult with him upon common affairs. This is what inspired Lotarius with those pretences which met with fuch bad fuccefs. When Agobard | wrote in favour of this prince, he alleged the emperor's own regulation, who had affociated Lotarius to the empire, after he had confulted the Almighty by a three days fast, and by the celebration of the holy facrifices; after the nation had fworn allegiance to him, which they could not refuse without perjuring themselves, and after he had fent Lotarius to Rome to be confirmed by the pope. He lays a stress upon all this, and not upon his right of primogeniture. He fays indeed, that the emperor had defigned a division among the younger brothers, and that he had given the preference to the elder; but faying he had preferred the elder, was faying, at the fame time, that he might have preferred his younger brothers.

But as foon as the fiefs were become hereditary, the right of feniority was established in the succession of the fiefs; and for the same reason in that of

⁺ See the Salic law, and the Law of the Ripuarians in the title of allodia.

[‡] See the capitulary of the year 817, which contains the first division made by Lewis le Debonnaire among his children.

^{||} See his two letters upon this fubject, the title of one of which is de divisione imperii.

the crown, which was the great fief. The ancient law of divisions was no longer subsisting; the fiefs being charged with a service, the possessor must have been enabled to discharge it. The right of primogeniture was established, and the reason of the feudal law forced that of the political or civil law.

As the fiefs descended to the children of the posfessour, the lords lost the liberty of disposing of them; and, in order to indemnify themselves on that account, they established what they called the right of redemption, whereof mention is made in our customs, which at first was paid in a direct line, and by usage came afterwards to be paid only in a collateral line.

The fiefs were foon rendered transferable to strangers, as a patrimonial estate. This gave rise to the right of fines of alienation, which were established almost throughout the whole kingdom. These rights were arbitrary in the beginning; but when the practice of granting these permissions was become general, they were fixed in every district.

The right of redemption was to be paid at each change of heir, and at first was paid even in a direct line §. The most general custom had fixed it to one year's income. This was burthensome and inconvenient to the vasfal, and affected, in some measure, the fief itself. It was often agreed * in the act of homage, that the lord should no longer demand more than a certain sum of money for the redemption, which, by the changes incident to money, be-

[§] See the ordinance of Philip Augustus, in the year 1209, on the fiefs.

^{*}We find feveral of these conventions in the charters as in the register-book of Vendome, and that of the abbey of St. Cyprian, in Poitou, of which Mr. Galland has given some extracts, p. 55.

Thus the right of redemption is in our days reduced almost to nothing, while that of the fines of alienation is continued in its full extent. As this right concerned neither the vasial nor his heirs, but was a fortuitous case, which no one was obliged to foresee or expect; these kinds of stipulations were not made, and they continued to pay a certain part of the price.

When the fiefs were for life, they could not give a part of a fief to hold in perpetuity, as a rear-fief; for it would have been abfurd that a person who had only the usufruct of a thing, should dispose of the property of it. But as soon as they became perpetual, this was † permitted, with some restrictions made by the customs ‡, which was what they

call difmembering of their fief.

The perpetuity of the fiefs having established the right of redemption, the daughters were rendered capable of succeeding to a fief, in default of male issue. For when the lord gave the fief to his daughter, he multiplied the cases of his right of redemption, because the husband was obliged to pay it as well as the wife ||. This regulation could not take place in regard to the crown; for as it was not held of any one, there could be no right of redemption over it.

The daughter of William V. count of Toulouse, did not succeed to the county. Afterwards, Eleanor succeeded to Aquitaine, and Mathildis to Normandy; and the right of the succession of semales feemed so well established in those days, that Lewis

† They fixed the portion which they could dismember.

⁺ But they could not abridge the fief, that is, abolish a portion of it.

[|] This was the reason that the lords obliged the widow to marry again.

the Young, after his divorce from Eleanor, made no difficulty in reftoring Guyenne to her. But as these two last instances followed close to the first, the general law by which the women were called to the succession of fiess, must have been introduced much later * into the county of Toulouse, than

into the other provinces of the kingdom.

The constitution of several kingdoms of Europe has followed the actual situation, in which the siefs were when those kingdoms were founded. The women succeeded neither to the crown of France nor to the empire, because, at the establishment of those two monarchies, they were incapable of succeeding to siefs. But they succeeded in kingdoms, whose establishment was posterior to that of the perpetuity of the siefs, such as those founded by the conquests of the Normans, those by the conquests made on the Moors; and others, in sine, which beyond the limits of Germany, and in later times, received in some measure a second birth by the establishment of Christianity.

When the fiefs were at will, they were given to fuch people as were capable of doing fervice for them, wherefore they were never bestowed on minors; but † when they became perpetual, the lords took the fief into their own hands, till the pupil came of age, either to increase their own profits, or to bring up the pupil in the military exercise. This is what our customs call the guardianship of a noble-

* Most of the great families had their particular laws of succession. See what M, de la Thaumassiere

fays concerning the families of Berry.

† We see in the capitulary of the year 877, apud Carisiacum, art. 3. Balusius's edition, tom. 2 p. 269. the moment in which the kings caused the fiess to be administered in order to preserve them for the minors; an example followed by the lords, and which gave rise to what we have mentioned by the name of the guardianship of a nobleman's children,

man's children, which is founded on principles different from those of tutelage, and is entirely a di-

skinct thing from it.

When the fiefs were for life, people vowed fealty for a fief, and the real delivery which was made by a sceptre secured the fief, as it is now by homage. We do not find that the counts, or even the kings commissaries, received the homages in the provinces; nor is this function to be met with in the commissions of those officers, which have been handed down to us in the capitularies. They fometimes indeed made all the king's subjects take an oath of allegiance 1; but this oath was fo far from being an homage of the same nature as those afterwards established, that in the latter the oath of allegiance was an | action joined to homage, which fometimes followed and fometimes preceded it, but did not take place in all homages, was less folemn than homage, and quite a distinct thing from it.

The counts and the king's commissaries made those vassals & whose sidelity was suspected, give oc-

t We find the formula thereof in the fecond capitulary of the year 802. See also that of the year 854,

13. and others.

M. du Cange, in the word hominium, p. 1163. and in the word fidelitas, p. 474. cities the charters of the ancient homages, where these differences are found, and a great number of authorities which may be seen. In paying homage, the vassal put his hand into that of his lord, and took his oath; the oath of fealty was made by swearing on the gospels. The homage was performed kneeling; the oath of fealty standing. None but the lord could receive homage, but his officers might take the oath of fealty. See Littleton, sect. 91. and 92. of homage, that is, sidelity and homage.

§ Capitularies of Charles the Bald, in 860, post reditum a Confluentibus, art. 3. Balusius's edition,

page 145.

cafionally a fecurity which was called firmitas; but this fecurity could not be an homage, fince the

king's * gave it to one another.

And if the abbot Suger + makes mention of a chair of Dagobert, in which, according to the testimony of antiquity, the kings of France were accustomed to receive the homage of the nobility; it is plain that he employs here the notions and lan-

guage of his own time.

When the fiefs descended to the heirs, the acknowledgement of the vassal, which at first was only an occasional thing, became a regular action. It was made in a more folemn manner, and was attended with formalities, because it was to be a monument of the reciprocal duties of the lord and vassal through all succeeding ages.

I should be apt to think, that the homages began to be established under King Pepin, which is the time I mentioned that several benefices were given in perpetuity; but I should not think thus without precaution, and only upon a supposition that the authors of the ancient annals ‡ of the Franks were not ignorant pretenders, who, in describing the act of fealty performed by Tassillon duke of Bavaria to King Pepin, spoke || according to the usages of their own time.

^{*} Ibid. art. 3.

[†] Lib. de administratione sua.

[‡] Anno 757. chap. 17.

Tassilo venit in vassatico se commendans, per manus sacramenta juravit multa & innumerabilia, reliquiis sanctorum manus imponens, & sidelitatem promisit regi Pippino. One would think that there was here an homage and an oath of fealty. See the capitularies of Charles the Bald, Balus. edit.

CHAP. XXXIII.

The fame fubjest continued.

When the fiefs were either precarious or for life, they feldom had a relation to any other than the political laws; for which reason in the civil laws of those two times there is very little mention made of the laws of fiefs. But when they were become hereditary, when there was a power of giving, selling, and bequeathing them, they had a relation then both to the political and the civil laws. The fief, considered as an obligation to the military service, depended on the political law; considered as a kind of commercial property, it depended on the civil law. This gave rise to the civil laws concerning siefs.

When the fiefs were become hereditary, the laws relating to the order of fuccessions must have been relative to the law of the perpetuity of fiefs. Thus this rule of the French law, estates of inheritance do not ascend &, was established in spite of the Roman and Salic * laws. It was necessary that the fief should be ferved; but a grandsather, or a greatuncle would have been very bad vassals to give to the lord: wherefore this rule took place at first only in regard to the fiefs, as we learn of Boutil-

leir +.

When the fiefs were become hereditary, the lords who were to fee that the fief was ferved, infifted that the ‡ daughters who were to fucceed to the

§ Book 4. de feudis, tit. 59.

* In the title of allodia.

+ Somme Rurale, book 1. tit. 96. p. 447.

‡ According to an ordinance of St. Lewis in the year 1246, to settle the customs of Anjou and Maine, those who shall have the care of the heiress of a fief, shall give security to the lord, that she shall not be married without his consent.

fief, and, I fancy, sometimes the males, should not marry without their consent; insomuch that the marriage-contracts became, in respect to the lords, both a feudal and a civil regulation. In an act of this kind under the lords inspection, regulations were made for the future succession, with a view that the fief might be served by the heirs: hence none but the nobility at first had the liberty of disposing of the future successions by marriage-contract, as * Boyer and † Austrerius have justly observed.

It is needless to mention that the power of redemption founded on the old right of the relations, a mystery of our ancient French jurisprudence which I have not now time to unfold, could not take place with regard to the fics till they were become hereditary.

Italiam! Italiam! ±

I finish my treatise of fiels at a period where most authors commence theirs.

* Decision 155. No 8. & 204. No 38.

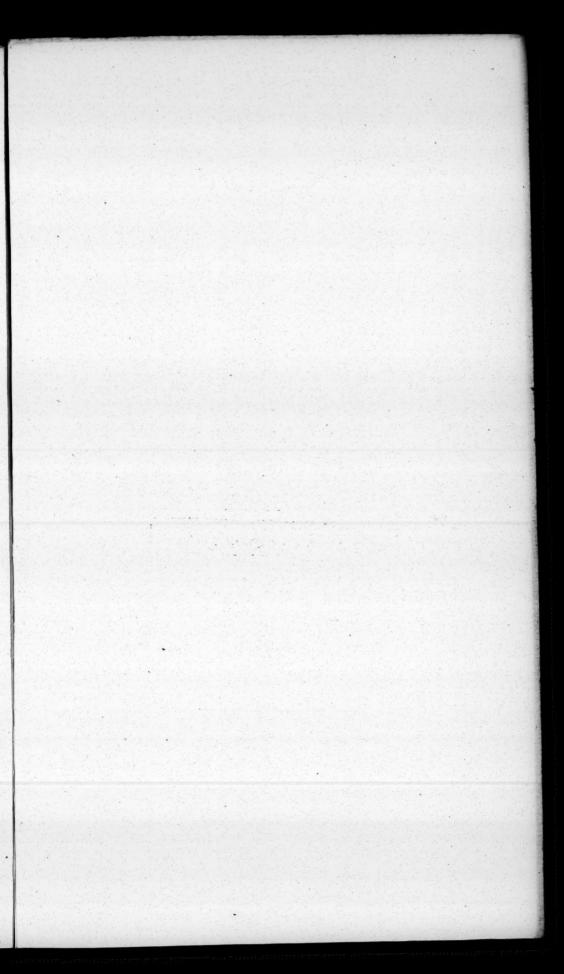
+ In Capell. Theol, decif. 453.

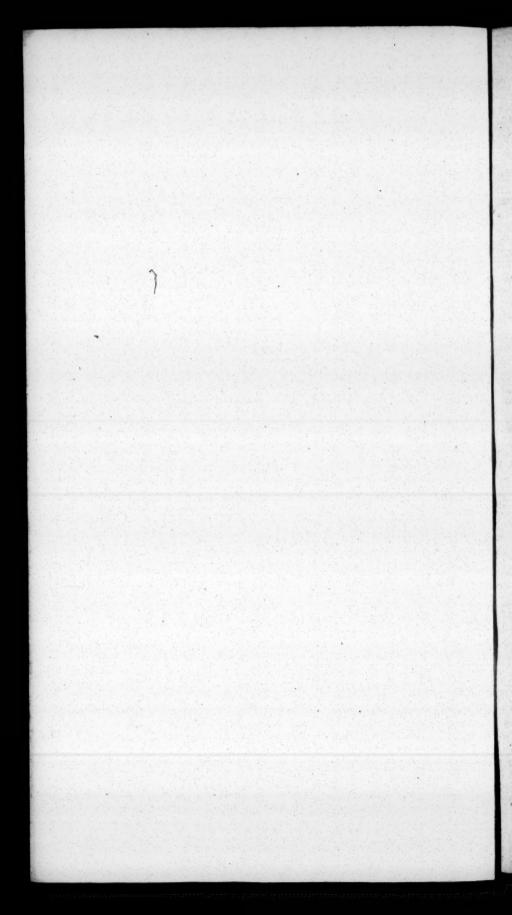
[‡ The author concludes his elaborate work with an allusion to the joyful acclamations of Æneas's followers upon coming in fight of the land of Italy, they so much desired, after so long wanderings, great dangers, and surious storms undergone in quest of it.

Italiam. Italiam! primus conclamat Achates:
Italiam læto socii clamore salutant.]

Æneid. lib. 3. ver. 522.







The Birch Octub. 23, 1761. 502 a 10